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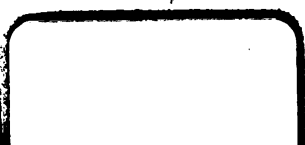
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Jan 1 1877  
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THE  
**LAW MAGAZINE;**

OR

QUARTERLY REVIEW

OF

JURISPRUDENCE,

FOR AUGUST, 1832; AND NOVEMBER, 1832.

VOL. VIII.

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LONDON:  
SAUNDERS AND BENNING, LAW BOOKSELLERS,  
(SUCCESSORS TO J. BUTTERWORTH AND SON,)  
43, FLEET STREET.

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## ERRATA.

Page 314, line 29, insert *takes* instead of *take*.

355 .. 22, instead of *every thing what*, insert *every thing but what*.

407 .. 9, insert *say* instead of *deny*.

428 .. 5, insert *alteration* instead of *alterations*.

429 .. 8, insert *are* instead of *is*.

REPORT COMMISSION OF SEVENTY-THREE 1010 pages, including the Propositions appended to this article. The Appendix is short, containing only fifty-six pages, twenty of which are occupied by an essay of the late Mr. Jeremy Bentham's on Registration. The subjects above-mentioned, however, were included in the Queries originally circulated by the Commissioners, and a variety of opinions concerning them are to be found in the Appendix to the first Real Property Report. We shall refer to these as we proceed.

**Tenures.** On this subject the first question to be considered is, whether it be advisable to retain the principle of law which supposes the absolute property or *dominium directum* of all lands to be vested in the crown, and all lands in the hands of a subject to be held of some superior. The Com-



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# THE LAW MAGAZINE.

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## ART. I.—THIRD REAL PROPERTY REPORT.

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*Copy of the Third Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property.*

WE cannot tempt our readers by promising that much matter of an amusing sort will be found in the following abstract of this Report, but those who may make an exertion to follow us, will be amply repaid in the end by the quantity of sound practical information they must acquire.

The subjects are—Tenures: Contingent Remainders: Future Estates and Perpetuities; Covenants; and a Period of Limitation for the Rights of the Church. The Report consists of seventy-three folio pages, including the Propositions appended to this article. The Appendix is short, containing only fifty-six pages, twenty of which are occupied by an essay of the late Mr. Jeremy Bentham's on Registration. The subjects above-mentioned, however, were included in the Queries originally circulated by the Commissioners, and a variety of opinions concerning them are to be found in the Appendix to the first Real Property Report. We shall refer to these as we proceed.

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missioners think that this principle should be retained; stating, at the same time, that persons of great learning have proposed that it should be abolished, and that all lands should become allodial. We are not informed who these persons of great learning are, and are far from wishing to impugn their authority; but, judging only from the printed opinions, we should infer that nine-tenths at least of the learning of the bar was decidedly opposed to the abolition. For instance, Messrs. Bell, Sidebottom, C. Butler, Turner, Walters, Coote, Morley, Harrison, and Senior, and even the late Mr. Humphreys, are opposed to it; two or three only adding, by way of qualification, to their reply: "unless the whole law of real property is to be codified." The objections, sufficiently obvious, are thus summed up in the Report:—

"Some few inconveniences, arising from the principle of tenure, still remain; but we think that they may be remedied by specific enactments. Although tenure, which was introduced for the military defence of the kingdom, has long survived its principal object, its consequences so deeply and extensively pervade the whole system of our Law of Real Property, that the abolition of it would be an innovation too dangerous to be prudently hazarded. The necessity would immediately arise of providing by positive enactment for all the rules deduced from tenure, which it is intended to preserve. Some of these, notwithstanding the greatest care, would probably escape attention; many questions would arise upon the meaning of the terms in which the existing law would be declared, and all the dangers and evils of codification would be encountered without its advantages."<sup>1</sup>

Amongst the tenural inconveniences alleged to remain, that resulting from the doctrine of Escheat is the chief.<sup>2</sup> In case of failure of heirs it is often found extremely difficult to ascertain the lord of the fee. Litigation ensues, and titles by escheat, say the Commissioners, are hardly ever reckoned secure. In the first Report it was suggested, that the heirs general should be

<sup>1</sup> See Mr. Bellenden Ker's examination, Appendix to first R. P. Report, p. 294. Mr. Tyrrell has stated (App. to 1st Rep. p. 308) that far from being desirable, it is not even practicable, to abolish the principle of tenure.

<sup>2</sup> See App. to 1st R. P. Rep. p. 113, 167, examinations of Mr. C. Butler and Mr. J. J. Park.

let in where heirs of the blood of the family from which the land descended should fail; and it is now proposed that, in failure of heirs and devisees, land of freehold tenure, unless where a quit rent is actually payable to some person as immediate lord, shall escheat to the crown.

“ The loss of the contingent benefit could not be felt by any intermediate lord. The chance is so remote, that it does not admit of being valued. One great advantage would arise from such a regulation,—that the property escheating to the Crown might be disposed of according to the dictates of natural equity; and a portion of it would probably be given to objects for whom the party last seised was morally bound to provide, although they could not claim as his heirs.”<sup>1</sup>

It is still uncertain whether equitable estates in fee simple are subject to escheat, and whether, when a lord acquires land by escheat,<sup>2</sup> it is not subject in his hands to the trusts. Doubts are also entertained as to the effects of escheat upon trusts of terms of years, so far as those trusts are for the benefit of the inheritance.

It is intended to remove these doubts and uncertainties by declaring, that equitable estates in fee simple shall escheat, instead of the trustee becoming entitled to the beneficial interest; that the escheated fee shall continue liable to the trusts; and that terms for years, so far as they are attendant on the inheritance, shall be held for the benefit of the lord, *i. e.* (if the above proposition be adopted,) of the crown.

Warranty, another incident of feuds, is condemned *in toto*. The consideration of the inconveniences resulting from the feudal maxim, that the tenancy of the freehold must always be full, is postponed to the second division of the Report; but a hope is expressed that, by means of the above suggestions and those to which we shall presently come, every advantage will be gained to the Law of Real Property which could be expected from declaring all freehold land allodial.

But though the essential principle of tenures is to remain, their variety is voted an unqualified evil, affording no facilities

<sup>1</sup> See *Thurmston v. Attorney Gen.* 1 Vern. 340.

<sup>2</sup> So stated by Mr. Butler notwithstanding the cases of *Burgess v. Wheate*, and *Middleton v. Spicer*.

either for varying the modes in which land is to be occupied, or for enabling the owner to regulate the succession to it or to apportion different estates or interests in it, according to the exigencies of society, by way of counterbalance to the long list of bad consequences produced by it. These are well stated, and must be regarded as the principal justification of sundry bold propositions, as to copyholds, gavelkind, and other modes of holding, which succeed. We shall therefore copy the statement at length :

“ The first which presents itself, is the existence of different systems of law to be administered by the same tribunals, for different portions of the soil of the same country, and for different interests in the same soil. If all these systems could be accurately learned and remembered, by all who ought to know them, much time must be wasted which might be usefully employed. But where the complexity, which we fear must always belong to the science of law in a civilized country, is wantonly aggravated by the admission of several concurring systems, serious mischiefs are likely to arise from the ignorance or forgetfulness of practitioners, and even of Judges, however carefully selected.

*“ As each tenure is abolished, a great mass of law is extinguished; no new law is introduced to create fresh doubts and questions, and unmixed benefit is, in this respect, conferred on the community.*

“ Where, as in France before the revolution, there are distinct codes for different provinces with ascertained boundaries, the *lex loci*, by which any particular portion of land is governed, must always be well known; but in England, where there are sometimes several codes in the same parish, and the boundaries of land held under different tenures are frequently confounded, a very serious inconvenience arises from ignorance of the tenure by which a particular piece of land is held; mistakes are made in settlements, purchases and wills, the intentions of parties are defeated, and they are forced into litigation.

“ Another evil, which has often presented itself to us, and which has long been seriously felt, is the difficulty of adapting measures, meant for the improvement of the Law of Real Property, to the various existing tenures.

"The Legislature, at different periods, intended that a judgment creditor should be allowed to take half the land of his debtor in execution, that the legal and equitable estate should unite in the party beneficially interested, and that a will of land should not be valid, unless attested by three witnesses.

"Yet it was found, without being foreseen, that none of these improvements applied to copyhold land, and they have never been extended to it, although no good reason can be assigned why there should be any difference in these respects between freehold and copyhold.

"We ought likewise to mention, that the expenses of transfer are often greatly increased by the variety of tenures. The same field, or the site of the same house, is sometimes partly copyhold, partly freehold; before the purchase can be completed, two titles are to be examined, and two sets of assurances to be executed.

"We will only further advert to the nice and perplexing questions of law, which often arise from the same words being applied, in legal instruments, to lands held by different tenures. Not only are parties thus involved in litigation which might be avoided, but discredit is brought upon the administration of justice."

There is only one paragraph which we have any inclination to cavil at here; the one marked by italics, which the Commissioners have such a fondness for, that they reproduce it, still more strongly worded, in a subsequent part (p. 12) of the Report, where, in winding up the head of gavelkind, it is said, "*Alterations in jurisprudence must always be proposed with anxiety when they introduce new Acts admitting of contrary constructions, but an amendment which abrogates an old head of law, and introduces no new one, is a certain good.*" Now we simply beg them to refer to their own remarks, already quoted, on the proposed abolition of the great principle of tenure, as an all-sufficient answer to this; or, if that do not satisfy them, we request them to say whether the best living lawyer would undertake to trace with unerring certainty all the ramifications of all the old doctrines of our law. If not, what becomes of the axiom so confidently and repeatedly laid down?

The subsisting tenures are then enumerated:—1. Frankalmoign, and by divine service. 2. Grand Serjeanty, as far as honourable services are concerned. 3. Free and Common Socage. 4. Socage, subject to the custom of Borough English. 5. Socage, subject to the custom of gavelkind. 6. Ancient Demesne. 7. Copyhold. 8. Customary Freehold.<sup>1</sup>

Frankalmoign and tenure by divine service, the tenures by which land is usually held by the church, produce no inconvenience; the only services ever rendered being a certain or uncertain number of prayers or masses, which lords, it seems, are not very eager to exact. The Commissioners say, that they are not aware of any question having arisen, or being likely to arise on these tenures, which they accordingly propose to retain. They think also that Grand Serjeanty should be preserved, as it illustrates the antiquities and history of the country, without interfering with the enjoyment of the land, or giving rise to litigation.

Free and common socage is warmly commended, as having all the advantages of the allodial ownership with the single exception of escheat. It is already the tenure by which the great bulk of real property in England is held, and the Commissioners express a wish that it could be made the only one. All the other species above enumerated, are wholly or in part condemned.

Borough English, strictly speaking, is not a tenure, though here classified as such. It is a custom according to which land descends to the youngest son in exclusion of the other children, and there are instances of the rule extending to collaterals. “This law of *ultimo-geniture* (say the Commissioners, p. 8) besides the general objection drawn from the difficulty of defining the local boundaries within which the custom prevails, and the inconvenience of a variety of laws, it is particularly objected to this custom, that it has the unfavourable tendency of giving each son successively an expectation of the inheritance, and that it is more difficult, in making out titles, to prove that there was no younger son than that there was no elder son. Borough English, therefore, and all

<sup>1</sup> A Sketch of the History of Real Property in England, including tenure, will be found in the L. M. 2d vol. p. 605, *et seq.*

other local customs, as to the alienation of land held in burgage or Borough English, are to be abolished. Gavelkind is to share the same fate, for some apparently strong and one or two apparently weak reasons.

It is obvious that the superiority of this tenure to tenure in chivalry with its multiform oppressions, which originally made it dear to Kentish men, can no longer be relied on in favour of it; and the peculiarities of gavelkind in respect of *cessavit*, writs of rights, curtesy, dower, and of alienation,<sup>1</sup> are hardly worth contending for, if not positively objectionable. The question, therefore, of preserving or abolishing the tenure may be fairly enough stated, as it is stated in the report, to rest upon its peculiar rule of descent. But it is far from clear that the commissioners have a right to address their opponents in this manner: "If any persons contend that gavelkind is preferable to free and common socage as it now subsists, they ought to argue for its extension over the whole realm, for there is nothing in the situation or circumstances of the county of Kent which renders the custom peculiarly adapted to that district." Nothing certainly in the soil or atmosphere, but much, we take it, in the feelings, associations, and even domestic arrangements of the inhabitants, which generally come under the denomination of "circumstances." In fact, the following mode of arguing the question, taken also from the report, may lead to a shrewd suspicion of the propriety of the above mode: "If the subject were treated on political ground, two questions present themselves. 1. *Rebus integris*. Is this a good rule of descent? 2. If not, is there now any serious objection to its abolition?"

The Commissioners have already decided that primogeniture is best suited to our political institutions, and most advantageous to agriculture;<sup>2</sup> nor is it now necessary to reopen the argument, for the Commissioners contend that the gavelkind rule of descent has neither the advantages of primogeniture nor of equal partibility, as it leaves the daughters un-

<sup>1</sup> An infant may alien by feoffment at the age of 16.

<sup>2</sup> See L. M. 2d vol. p. 636. To the references there given, may be added Chaptal's *Chimie de l'Agriculture*; and the French edition of Smith's *Wealth of Nations*, by Garnier.



provided for.<sup>1</sup> But, independently of political considerations, there are said to be mischiefs attending this mode of descent sufficient to justify its abolition. Most of these resolve themselves into the difficulty experienced in disposing of or dealing with the property. In France and other countries, where the law of partibility prevails, a power is given to sell or divide the estate on the death of the ancestor; but no sale, nor complete partition, nor even valid lease, of a gavelkind estate can be made until the youngest son attains the proper age to execute a conveyance, and the family, in the interim, may be scattered over every quarter of the globe. The following extract will show the manner in which titles are complicated by the operation of the rule:—

“One case,” say the Commissioners, was stated to us, “in which, in order to clear an estate of all doubts about the title, it was necessary to have about forty persons vouched in a recovery, the estate being split among forty heirs. A conveyancer of the first eminence, to a question respecting the operation of the custom of gavelkind, answered, ‘I have more than once had titles before me, in which it was almost impossible to ascertain with accuracy how far the estate was divided. I know it did not come to half a seventy-second in one instance, and it was amazingly complicated. I have had several times great difficulty in deducing the title, on account of the subdivisions of the estate.’<sup>2</sup> I had one instance, in which there were twenty-nine parties interested in property that was not worth above 300*l*.’<sup>3</sup>”

It is also stated by Mr. Bell,<sup>4</sup> and confirmed by indisputable authority, that there is a growing danger of questions arising as to what lands are exempt from the custom, and that, on a purchase of land in Kent, there is an additional expense in ascertaining the fact. Many palliatives have been

<sup>1</sup> This is the opinion of the late Mr. Humphreys, 1st Rep. App. p. 253.

<sup>2</sup> The inconvenience of this subdivision in the case of trusts is particularly dwelt upon. See Mr. Tyrrell's Answers, 1st Rep. App. p. 308.

<sup>3</sup> See Appendix to 1st Report, p. 270. Examination of A. R. Sidebottom, Esq.

<sup>4</sup> App. to 1st Rep. p. 228. Mr. Bell had recently purchased several estates in Kent; and see Mr. Butler's Ex. p. 113, and Mr. Sidebottom's, p. 271; but see Mr. Walter's Ex. p. 366, *contra*.

proposed; as that trust estates should descend to the eldest son, or that one of the co-heirs should be empowered to convey the whole interest, and that a power should be given to every tenant in fee to disgavel his land by an instrument enrolled. But there are insuperable objections to each of these schemes. The proposed power, indeed, would clearly introduce a new element of uncertainty; so that a total and simultaneous abolition has been resolved upon. The two principal objectors, whose names we are now able to recall, are Mr. Walters and Mr. Senior, both undoubtedly authorities of weight. Their opposition appears to be mainly grounded on a belief that the gavelkind rule of descent, though far from perfect, distributes the property with less injustice than the law of primogeniture. The predilection of the inhabitants of Kent for gavelkind has been also confidently urged, and its very existence as confidently denied by many distinguished practitioners. That the aristocracy of Kent uniformly prevent the operation of the law by means of wills and settlements, seems generally agreed; and the late Mr. Butler, who must have had as much experience as most men in such matters, asserts that he never knew an instance in which a person appeared to him to feel a partiality for gavelkind. This Report will probably soon bring the question of partiality or indifference to the test; for, if the predilection exists, we shall soon find the members for Kent speaking, and the landholders of Kent petitioning, against the proposition. Our own opinion on the subject is pretty nearly that of our old adversary, Mr. Humphreys, who thought that, on the whole, disgavelling the county would do good, but was not inclined to insist upon it, provided the inhabitants of Kent "came with boughs in their hands as at the time of the conquest."<sup>1</sup>

*Ancient Demesne.*—The very first sentence upon this tenure affords a strong argument against it: "There is great confusion in the law books respecting this tenure." The peculiarities attached to it are also strikingly objectionable, the tenants being obliged to sue and be sued in the Lords Court in all actions respecting their tenements, and exempted from

<sup>1</sup> First Rep. App. p. 253.

serving on juries elsewhere, and from paying toll in any part of England. From the first of these privileges or obligations it results, that fines and recoveries suffered in the common manner are liable to be invalidated, on its subsequently appearing that the land is ancient demesne. This inconvenience was obviated by a suggestion in a former Report, since incorporated in the fines and recovery bill; but the Commissioners now think it best to abolish the tenure, with all its incidents, at once, reserving all his present rents, fines, and services to the lord. They see no pretence for the above exemptions, and as, in ancient demesne, there are no subdivided and conflicting interests in the soil, no practical difficulty presents itself. This suggestion is almost universally approved.

*Copyholds.*—"We now come to a tenure attended with evils much more serious than any we have before described, and which admit, we fear, only of partial, slow, and uncertain remedies." After a brief sketch of its origin,<sup>1</sup> the Commissioners proceed to a formal recapitulation of its advantages and disadvantages, through which we shall endeavour to follow them. They begin with the disadvantages. The first arises from the multiplicity and uncertainty of customs in different manors, each of which is said to have a system of laws to itself, "to be sought in oral tradition, or in the Court Rolls or proceedings of the Customary Court, kept often by ignorant and negligent stewards." As these customs relate, not merely to the creation and transmission of estates, but to dower, curtesy, descent, the right to timber and minerals, and indeed to almost every conceivable incident to landed property, the inconvenience is necessarily great. A second disadvantage is the frequent intermixture of copyhold and freehold lands, and the difficulty of identifying them. Yet, if the owner, mistaking the tenure, exercise a freehold right upon copyhold land, such land is forfeited to the lord, who may seize it upon proving it to be copyhold. Upon a sale, therefore, it is an insuperable objection that the vendor cannot point out with certainty what part of the estate is freehold

<sup>1</sup> See a Sketch of the origin of Copyholds, L. M. 2d vol. p. 606.

and what copyhold. A third and certainly the greatest evil arises from the check to improvement occasioned by the conflicting rights of lord and tenant. In some manors, the tenants are entitled to cut timber and open mines; in others, the lord may enter for that purpose; but generally, it is said, although the timber and minerals are his property, he cannot take them without the tenant's license; so that, without a special agreement, they are of no use to either. The consequence of the law respecting timber is, that very little is permitted to grow. The saying, that "the oak scorns to grow except on free land," doubtless originated in this circumstance; and it is certain, add the Commissioners, that in Sussex and in other parts of England, the boundaries of copyholds may be traced by the entire absence of trees on one side of a line and their luxuriant growth on the other. Minerals will remain *in statu quo*, unimpaired by time or neglect, but a good deal of litigation is founded on disputed claims to them. Fourthly, the fines due to the lord on descent and alienation, being usually computed with reference to the improved value of the land, tend, like tithes, to discourage agriculture, and, worse than tithes, to prevent the erection of buildings. The Commissioners have some just remarks on this subject:

"The land remaining unimproved, no benefit accrues to the lord. It may be observed, that wherever there is a subdivision of the right to the profits of the same land between different individuals, although the parts are necessarily equal to the whole in legal interest, they are by no means so in actual value. With respect to copyholds, the benefit accruing to the lord from his rights over the copyhold tenement, bears no proportion to the injury they occasion to the tenant; and a change of the tenure, whenever it can be effected, will be for the benefit of both."

The necessity of a license to enable a copyholder to lease for more than a year, is another fruitful source of embarrassment; particularly as the lord may have an estate for life only, and the license determines with his interest. The list of grievances concludes by the mention of Steward's Fees, which are said to form a heavy burthen, and of heriots, which, however, are not confined to this description of property. There

are some counter-balancing advantages, but they may all be classified under two heads: advantages which copyholders ought not to enjoy, as the exemption of their lands from liability for their debts; and advantages which the Commissioners have already proposed, or are about to propose, extending to all other descriptions of proprietors. Foremost among the latter, stands the publicity attendant on all dealings with the land. "A real superiority now belongs to copyholds from surrenders and admissions appearing on the Court Rolls, whereby all danger of the suppression of deeds affecting the legal title is prevented, outstanding terms are not wanted, and the land is held by one simple and notorious title. But when a general register shall have been established, we anticipate that the same advantages will be enjoyed as to all the land in the kingdom." As the Commissioners' testimony may be regarded with some suspicion on this subject, we think it prudent to add, that almost all the gentlemen examined concur in thinking the publicity of copyhold assurances a benefit.<sup>1</sup> Other advantages about to be rendered general are—the power enjoyed by copyholders in most manors of claiming without any impediment from dower, the wife being dowable only of lands of which the husband dies seised; and the greater security of contingent remainders, which cannot be destroyed by the destruction of the particular copyhold estate. On the whole, therefore, it seems clear that the abolition of copyhold tenure is desirable, and of that opinion are Messrs. Sidebottom, Ker, Walters, Morley, Coote, Butler, Park, and Senior. Mr. Justice Taunton and Mr. Serjeant Peake, with some few other practitioners, are opposed to it; and Mr. Bell and Sir James Graham think that the affording additional facilities for, and cheapening the process of, enfranchisement, is the utmost that can be done without interfering too greatly with vested rights. This also is the conclusion arrived at in the Report:

"Having thus explained the reasons why it appears to us so expedient that copyhold tenure should be changed into

<sup>1</sup> See amongst others, the examination of Mr. Coote, one of the earliest opponents of Registration.—App. to 1st Rep., p. 338. "All who are acquainted with these tenures, praise the cheapness and simplicity of transfer, and the security of title derived from the Court Rolls." (Communication from the Right Hon. Sir James Graham.—App. to 3d. Rep. p. 5.)

common socage, we are obliged to confess that, after deep deliberation, we have not been able to discover any means of speedily attaining so desirable an object. In examining the different cases to be provided for, we have found the difficulties great in proportion as the necessity for the change is urgent.

“ We have been obliged to reject all the plans suggested to us for the compulsory abolition of copyhold tenure, and we consider it unnecessary to discuss them in detail. It appears to us that they would either work injustice, or that they would introduce complicated, expensive, and inefficient machinery for adjusting the claims of the lord and tenant. These vary so much according to the customs of different manors, that no general rule can be laid down respecting them, and copyhold tenements being generally of small value, they could not afford the expense of the appointment of commissioners to regulate the terms of enfranchisement, or the expense of a trial by jury to ascertain the amount of compensation.

“ In the few instances in which the fine is certain, and the tenant is entitled to the timber and minerals, and privileged to commit waste, it might be easy to lay down a rule by which the fine might be converted into a periodical payment, charged on the tenement as a rent; but, in general, there could not be a just compulsory enfranchisement without a specific and particular valuation of each tenement, and of the lord's interest in it.

“ It must likewise be recollected, when compulsory enfranchisement is considered, that the pecuniary circumstances of many individuals may render the advance of money highly inconvenient; that a portion of the tenement to be allotted to the lord by way of compensation would generally be too minute to be of any value; and that there would be great difficulty in apportioning compensation among all who, in possession or remainder, might be entitled to share it, and in securing small sums to meet future contingent interests.

“ All that we deem practicable, and can recommend, is to give facilities to voluntary enfranchisement where there are particular estates in the manor or in the copyhold tenement, and to introduce certain improvements in the law relating to copyholds while they continue to exist.

“ Enfranchisement, we think, must in all cases remain a

voluntary proceeding, to be accomplished by a contract of the lord and the tenant. But at present no enfranchisement can be effected, unless both parties are entitled to the fee simple; and enfranchisement has no doubt been much impeded by this difficulty."

It appears from the queries and answers that the principal plan contemplated was, the compulsory commutation of the lord's rights by a fixed annual quit rent to be charged on the land. The particular propositions for facilitating enfranchisement, will be found at the end of this article. It will there be seen (Prop. 22) that the interests of the church are guarded with peculiar care; and that, besides suggesting means for getting rid of all existing copyholds, the Commissioners propose to forbid the creation of any estates of the same nature again.<sup>1</sup> Many wise suggestions for mitigating the inconveniences of the tenure succeed.<sup>2</sup> Thus, peculiar customs as to descent, curtesy, and dower, are to cease; wills of copyhold are to be made with the same formalities as wills of freehold land; the copyholder is to have the power of leasing for twenty-one years at rack rent without a license; and heriots are to be converted into a right to a sum certain. We regret to say that it has been deemed impossible to interfere with the rights of the lord and tenant as to timber and minerals, for, it is to be presumed, the same reasons which induced the Commissioners to reject the commutation plan above mentioned. "It can only be hoped," they add, "that such an irremediable evil of the tenure will induce the parties to avail themselves of the new means furnished to them of putting an end to it."

*Customary Freehold.*—This is a base tenure, partaking, to a great degree, of the nature of copyhold. The attention of the Commissioners appears to have been most particularly called to it by a communication from Sir James Graham (the first Lord of the Admiralty), who states that, in his own county of Cumberland almost every parish contains custo-

<sup>1</sup> One gentleman (Mr. Partington) recommends the extension of the power vested by the customs of some manors in the lord, of granting portions of the waste to be held by copy.

<sup>2</sup> See *post*, 62.

mary lands, and that, besides the inconveniences which the owners share with copyholders, they are subjected to a very grievous one from never having had the power of devising extended to them.<sup>1</sup> The statute of Wills was held not to extend to copyholds, and the statute 55 Geo. 3, c. 19, s. 2, passed to remove certain difficulties in the disposition of copyholds by will, is limited to cases where custom sanctions a devise. In those manors, therefore, (and there are many) where no such custom exists, the customary tenants are driven to the same description of tortuous, expensive and dangerous contrivances which were resorted to by proprietors at large before wills were duly sanctioned by law.

The following description of the process is given by Sir James Graham.

“ A customary tenant, therefore, wishing to devise his estate, or to divide it among his children, is driven by the law to a subtle subterfuge: in his own life-time he makes an absolute surrender of his customary estate to a tenant in trust; from this trustee he receives a declaration of trust to the uses of the will, which is made in conformity; and the will once made cannot be revoked,<sup>2</sup> because the deeds cannot be cancelled: here, then, is an expensive and onerous process; two deeds superadded to a will, and an absolute irrevocable surrender of the estate in the life-time of its owner, required by law for the completion of a title to exercise the ordinary rights of property, of which the power of disposal after death is always the consummation which man most ardently desires.

“ But the evil does not end with the life of the customary tenant; a third deed is required before the devise can take effect: the tenant in trust, who is in absolute possession, must surrender to the uses of the will; if he be honest, he does this, and the object of the testator is obtained by a circuitous and expensive course; if he be fraudulent he refuses to surrender, and he can only be evicted from his colourable title by a suit in equity, a remedy usually considered too costly for the poor and too tardy for the aged.

“ I know a case where the trustee died before the conveyance was executed: his eldest son was insane, but at length died also, leaving a brother, who had been absent many years abroad, whose place of residence could not be ascertained; the name of the ori-

<sup>1</sup> Sir James Graham brought in a bill to remedy this evil in 1828, but, at the request of the law officers, left the matter to the Commissioners.

<sup>2</sup> The declaration of trust, it is subsequently shown, is general; the particular trusts are declared by the will, which may of course be altered.



ginal trustee remained on the Court Rolls ; the property for years could not be sold, to the irreparable injury of the devisees, until at last, by pure accident, it was discovered that the representative of the trustee was a mariner living in the West Indies."—*Appendix to Third Report*, p. 3.

The Commissioners admit the complaint to be well founded, and promise to comprise customary lands in their regulations as to devises in general. The tenure is expressly included in the propositions relating to copyholds.

*Contingent Remainders.*—This head is prefaced by an historical sketch of remainders. We shall content ourselves with a few sentences, for it is not likely that any persons will interest themselves in this portion of the Report who are not acquainted with the nature of a remainder already. Besides, we explained the origin of contingent and future interests in land in our review of the First Report.<sup>1</sup>

According to Sir Edward Coke, a remainder is the remnant of an estate in lands or tenements expectant upon a particular estate, created together with the same at one time ; and, it may be added, it is so connected with the particular estate, that, unless it can take effect when the particular estate determines, it is void.<sup>2</sup> From this connection the principal hardship relating to contingent remainders results. If by any means the particular estate be determined before the occurrence of the contingency, the right of the contingent remainder-man is gone. For instance, in the familiar case of a feoffment to A. for life, with remainder to the right heirs of B., the remainder is contingent until B.'s death, because, so long as he is alive, there can be no person answering the legal description of his heir. If, therefore, A. by any tortious act (as by feoffment, fine, or recovery) were to forfeit his life estate during the life-time of B., there would be no particular estate remaining to support the contingent remainder, and B.'s right heirs would lose the property without any fault of their own, and probably in direct contravention of the grantor's wishes, who would never think of conferring such a power (a power of doing evil without any compensating good) unless it were fairly forced upon him by the law. The absurdity of

<sup>1</sup> L. M. vol. ii. p. 614 and 626.

<sup>2</sup> Third Report, p. 23.

this doctrine is so manifest, that courts of equity have uniformly refused to sanction it. It was early settled, say the Commissioners, that such (equitable) interests are not capable of being destroyed by the act of the owners of the preceding estate; and it is also justly remarked in the Report that “ the artificial practice of limiting estates to trustees for preserving contingent remainders, by which instruments are rendered unintelligible to unprofessional persons, shows, in a remarkable manner, the opposition between the rule of law and the convenience of mankind.” In 1783 the late Mr. Shadwell (the father of the present Vice-Chancellor) prepared a bill to preserve contingent remainders against the tortious acts of the tenant for life, but, for some unknown reason, it was dropped. The Commissioners propose to go a little further, and enact, “ that a contingent remainder, where the particular estate may determine before the period of the vesting of the remainder has arrived, shall take effect as if it had originally been a future estate (becoming, in that case, liable to the rules prescribed for restraining perpetuities), and that the union of the particular estate, and the next immediate estate in remainder, shall not have the effect of destroying it.” This amendment draws after it the necessity of providing for the disposition of the profits arising between the determination of the particular estate and the happening of the contingency.

“ There are two modes of providing for this event; the one, to give them by way of resulting use to the grantor, or his heirs, or persons deriving title through him; and the other, to give them to the person entitled to the first vested estate. We prefer the latter mode; for, generally speaking, a settled estate is wholly withdrawn, or separated from the remaining unsettled estates, so as not to leave any ground for supposing that the settlor meant any interest in it to remain undisposed of.” There is also a third mode: the profits might be left to accumulate for the benefit of the contingent remainder-man; but we think the mode adopted the preferable one.

It is another rule of law that a contingent remainder limited to several individuals, as a class, vests in those only who are in existence at the determination of the particular estate, to

the exclusion of others who may come into existence afterwards. The following illustrations are given in the Report:

"Thus, where an estate was devised to J. H. for life, and after his decease, to all the children of S. M. 'begotten, and to be begotten,' it was held, that it vested in five children, who were born in the life-time of J. H., and that four others, who were born after his decease, were excluded; although, in the same will, another estate devised to the children of S. M. in the very same words, (but without any previous life estate,) vested in all the nine children. The ground of the distinction was, that the latter gift took effect as an executory devise, which the former could not, because (as it was held) it might take effect as a contingent remainder; and the maxim of law is (as already stated) that what may take effect as a contingent remainder, shall never be an executory devise. Other cases, involving similar hardship, have not unfrequently occurred in practice. The same consequence might arise upon a devise in favour of grandchildren, nephews or brothers, or even classes of persons still more indefinite or numerous. A case did occur in Lord Mansfield's time, in which a contingent remainder took effect in favour of twenty-one grandchildren, because (as his lordship laid it down) they were all in existence."

A distinction such as this, the effect of a purely technical construction, ought certainly to be done away with, and the Commissioners, inclining towards the reasonableness of the rule adopted with regard to executory devises, propose that after-born children shall be let in.<sup>1</sup>

No contingent remainder is transferable at law, except by a fine; and the mode in which a fine operates as a transfer is said to be scarcely well settled. The reasons for this restriction are involved in doubt, and the Commissioners content themselves with declaring those that have been suggested technical and unsatisfactory. "It is sufficient to say, that a restraint upon alienation at law, when no principle of reason or policy can be adduced to justify it, and where no corresponding restraint exists in equity, is a defect in the law which it must be both desirable and safe to remedy; and we there-

<sup>1</sup> See post, p. 64.

fore propose an enactment which shall have the effect of rendering contingent remainders, and other contingent interests, transferable at law, with the exception we have mentioned. This, we are aware, would extend to many new cases, the uncertainty of titles, which already exists as to all cases of vested estates not in possession; and we should therefore hesitate to recommend its adoption, unless a general register were established, which would remove the danger altogether." The exception above alluded to may be seen in the Proposition.<sup>1</sup> In the present state of the general register question, the expediency of making new propositions depend upon it may well be doubted.

*Freeholds to commence in futuro.*—The common law did not permit an estate of freehold, not preceded by a particular estate and taking effect on its determination, to be created *in futuro*. The conveyance of an estate to B. for life, or in fee, to take effect after the death of A., was absolutely void by the common law. In this case again opinions are said to differ as to the ground to which the rule of law is to be referred; nor is it worth speculating about. Suffice it to say, that it did not apply to incorporeal hereditaments—did not prevail in the system of uses—has not been followed in equity—and that even courts of law, as the commissioners assure us, have felt the inconvenience of their own rule so strongly as to have repeatedly resorted to astute contrivances to evade its operation.

It is therefore proposed to enact, that estates of freehold may be conveyed or created to commence at a future time, whether certain or uncertain.

*Springing and Shifting Uses, and Executory Devises.*—These are modes of doing, under the statutes of uses and wills, much that common law conveyances were unequal to; as limiting a fee upon a fee, and creating future and contingent estates without particular estates to support them and consequently without incurring the risks to which, as above mentioned, contingent remaindermen are liable. They are

<sup>1</sup> Post, p. 64.

found useful in practice, and by their pliability (if it may be so expressed) are adapted to every kind of provision which can be required in a family arrangement. "At present, however, (continue the Commissioners,) estates and interests arising by way of springing or shifting use, or by executory devise, before they become vested, are transferable at law only to a limited degree. They are capable of being disposed of by will (according to the rule that whatever interest is descendible, is also devisable); but they cannot, before they become vested, be conveyed by deed. In this case again, the rule is different in equity; and upon the principle which we have stated with reference to contingent remainders, we recommend that estates to arise by way of springing and shifting use, and executory devise, should be made transferable at law to the same extent as contingent remainders."

*Executory Interests in Chattels Real.*—Here again we find the same principle pursued. By the common law, no partial interest can be created by deed in a term for years. A gift or grant for a less period than the term may operate as a creation of a new derivative term; but the gift or transfer of the term itself for a day, is a gift or transfer of the whole term. It is not so in equity, and partial interests in terms may also be created by will. The Commissioners think that, to the same extent, they should be capable of being created by deed.

*Perpetuities.*—The main question to be decided here is, to what extent, and for what length of time, a person shall be allowed to regulate the disposition of his landed property, after he himself has ceased to exist; and a very interesting and important question it is. The Commissioners begin by stating that the ancient common law did not restrain the creation of future interests to any given period; the times allowed for re-entries under conditions broken, for grants of rent charges, or other incorporeal hereditaments commencing *in futuro*, and for creating an *interesse termini*, being indefinite. The rule against double possibilities, they contend, had no reference to the law against perpetuities—even

granting, which they doubt, that such a rule ever existed at all.<sup>1</sup> But though there was no direct law against perpetuities, it was hardly possible to fetter a property by bonds that were likely to last, until the statute *de donis* conferred the power of establishing a perpetual and unalienable entail; "and this (say the Commissioners) continued until the ingenuity and good sense of the Judges, without the aid of the legislature, and in opposition to a positive Act of Parliament, enabled tenants in tail to unfetter their estates in favour of the free circulation of property." Nor is the overthrow, or rather undermining, of entails, the only instance in which the Judges, guided by expediency, have ventured to take upon themselves the responsibility of law-makers. It is owing exclusively to them that restrictions equally injurious did not immediately take the place of entails; there being no act of Parliament, nor (as already shown) any rule of the common law, to invalidate the effect of the various ingenious contrivances for tying up property, which succeeding generations of lawyers, with uses and trusts to aid them, have hit upon. The history of these attempts is carefully traced in the Report; but as it is partly well known to the practitioner already, we shall merely set down the result.

At the time *Thellusson's* case was decided, land might be rendered inalienable during a life or lives in being, and twenty-one years and nine or ten months afterwards. This period had been fixed, as formerly explained,<sup>2</sup> in analogy to the case of a settlement; for if (to borrow the confirmatory statement of the Report) a settlement had been made to the use of A. for life, with remainder to his first and other sons successively in tail, with remainders over, the first tenant in tail (who might gain the unlimited disposal of the property by fine or recovery) could not be deprived of the possession beyond a life in being, although, in consequence of his minority, he might have been deprived of the actual power of alienation until twenty-one years after. It is still a matter of doubt whether the twenty-one years must depend upon the minority of a person intended to take, or whether a gross term

<sup>1</sup> It is proposed to remove this doubt by a legislative declaration.

<sup>2</sup> Vol. II. pp. 625, 626.

of twenty-one years may be created. The late Mr. Thelluson, availing himself to the full of the powers conferred by this rule, directed his property to accumulate during such a number of lives, that, according to Mr. Hargrave's computation, taking the real and personal estate to amount at the testator's death to £600,000, the fund might possibly amount, at the end of the period of accumulation, to seventeen or eighteen millions of money. The will, however, was held good.

"A case so extravagant, (say the Commissioners,) and so contrary to policy, did not escape the attention of the legislature, which, by the statute 39 & 40 Geo. 3, c. 98, restrained the period of accumulation 'to the life or lives of any grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of such grantor, settlor, deviser or testator, or during the minority, or respective minorities, of any person or persons who shall be living, or in *ventre sa mère*, at the time of the death of such grantor, &c., or during the minority, or respective minorities only, of any person or persons who, under the uses or estates of the deeds, surrenders, wills, or other assurances, directing such accumulation, would, for the time being, if of full age, be entitled to the rents, &c. so to be accumulated;' but with an exception as to provisions for the payment of debts, or raising portions for children, taking under such conveyance, &c. This act made, however, no alteration in the period allowed for deferring the vesting of estates to take effect after a life or lives in being, and twenty-one years afterwards, but merely confined the period of accumulation. It afforded, therefore, but a partial remedy."

In a later case (*Bengough v. Edridge*), limitations of the inheritance were suspended during the lives of twenty-eight persons and the survivor of them, and a gross term of twenty years. We shall give the observations with which the Commissioners conclude their account:

"From the above observations it will be seen, that the Earl of Nottingham, in the reign of Charles the Second, allowed, against the opinion of three judges of the common law, an executory devise or trust, to take effect and defeat prior existing estates, after one life in being. From that time the progress of these novelties in the law has been slow; but still,

by almost imperceptible degrees, the known limits have been extended from one life to two or more lives, and ultimately to twenty-eight lives and the life of the survivor, and, after the decease of the survivor, to a gross term of twenty years; and upon the same principle the period may be extended to any number of lives, for the reason which the judges have given for sanctioning the extension of the number of lives in being, is, that the lives are wearing away at the same time, or, as it has been expressed, 'all the candles are burning at once.'

We proceed to enumerate the other cases to which the rule against perpetuities applies, or is supposed to apply.

Leaseholds for lives do not at first view appear to be within the scope of the rule, as the estate itself must determine with lives in being; but where the lease is renewable, the same inconvenience may obviously occur.

It is stated that questions frequently arise whether powers operating as contingent and springing uses are, from the generality of the words creating them, within the limits of the rule; and five illustrative cases are given. The first three turn upon a very simple distinction. If, it is laid down, an estate be settled to the use of A. B. and his heirs, with a power of sale or revocation reserved to C. D. and his heirs, this would be bad: but if the power were not to be exercised without the consent of A. B. or the person for the time being entitled to the ownership, the reservation would be good; for the person so entitled might at any time destroy the power by a conveyance of the estate, which would render his subsequent consent impossible. We shall give the two other cases as they are put:

"But if an estate be limited to A. B. for a term of 1000 years, so as to vest the absolute legal and equitable interest in him, with remainder to C. D. and his heirs, and with a power reserved to the same C. D. and his heirs, to revoke or determine the term, there is reason to suppose this power would be void; for the power might be exercised after the period fixed as the boundary for perpetuities.

"The case seems to be essentially different where, in the usual way of marriage settlements, a term of years preceding all the other limitations, is limited to trustees, for a particular purpose connected with the other limitations in the settlement, and usually with a provision for the cesser of the term, when



the purpose for which it was created has been effected (as a term either for securing a jointure, or for raising portions for younger children) subject to a power of sale and exchange, to be exercised only with the consent of the beneficial owner, and which power, if exercised, would of course over-reach all the preceding limitations."

The three next topics are thus briefly dispatched:

"With respect to springing and shifting uses, and executory devises, to take effect upon the neglect of using or continuing a particular name, and using certain arms, or upon the accession of another estate, the rules limiting them within the bounds of perpetuity are well known, and do not call for any particular notice.

"A power of sale for raising money for payment of debts generally, does not seem to be within the reasons of the rule against perpetuities.

"Courts of justice do not hold trusts, executory devises, or springing uses, which tend to perpetuity, valid to the extent of the rule, and void only as to the excess, a doctrine which (as we shall hereafter remark more fully) has been thought to occasion much hardship."

The instances hitherto adduced are of interests springing out of the Statute of Uses and Wills, or taking effect as executory trusts. We now come to certain common law interests, which have never been deemed within the law against perpetuities, though equally contravening its policy. There was no limit by the common law to terms of years; and common law rents are said to stand upon the same footing. Rights of entry upon conditions broken are not restricted within any definite period of time; and a case is put by the Commissioners, frequently occurring in practice and never determined, to show the inconveniences of the law. An estate is devised to A. B., his heirs and assigns, on condition that he and they should take and continue to use the name and arms of C. D. After half a page of reasoning, they decide that this is not a determinable fee, nor a fee simple conditional at common law; it is simply (if anything) a condition, upon the breach of which the heir of the testator might enter at any future time, however distant.

Again, to every exchange at common law an implied condi-

tion is annexed, that if either of the parties be evicted owing to the failure of the other's title, the party so evicted may re-enter on his original estate, and no period is fixed within which the re-entry is to be made.<sup>1</sup> The Commissioners express no opinion in this part of the Report as to the policy of leaving this right of re-entry unlimited, but they think that where a perpetual rent-charge is granted, with a power of entry to satisfy arrears, this power is necessarily coextensive with the rent.

“ We have thus (say the Commissioners) taken a review of those parts of the existing law relating to perpetuities, and those subjects connected with it, as to which we consider legislative enactment or declaration desirable. It will readily be admitted that this is a subject of great importance and great difficulty. We think it will not be denied that the restrictions imposed by this doctrine of the courts, are both beneficial and reasonable in their general extent. There being therefore no question as to the propriety of continuing this branch of the Law of Real Property, we have considered whether any alteration can be usefully made in the details of the law itself, and especially whether it is expedient to retain, in all cases, that part of the rule which determines that estates or interests created so as not necessarily to vest within the period allowed, shall be altogether void, or whether in certain instances such estates or interests, although not necessarily to vest within the period, may be supported, if they shall in fact vest within some limited period.”

The first part of the rule, however, which comes under consideration, is that which relates to the number and quality of the lives to be taken; and it will be found, on referring to the Propositions, that they intend to leave the number unlimited. They admit the liability to perversion of the rule as it stands, but state that, after paying anxious attention to a suggestion made from several quarters that the number of lives to be taken in any case should be restricted to three, or some other small number, they have found insuperable difficulties in the way of such a regulation.

<sup>1</sup> In all these cases it is of course implied that the entry shall take place within the regular period from the accruing of the right of entry.

“There is no observation more important to be borne in mind, than that parties dealing with their property should be allowed the utmost latitude which is not forbidden by public policy. That rule, as applied to the present subject, would make it proper to allow the use of all such lives (to whatever number they might extend) as might be in any manner connected with the objects of the settlement, or the dropping of which might furnish the motives for any of its limitations. For instance, in settlements of large properties, subject to leases for lives, or to jointures, or estates by the curtesy, some of the limitations are often dependant on the dropping of the existing leases or incumbrances; in other cases, estates are intended to shift from one party to another on the dropping of the lives of third persons. In such cases, and many others that might be put, it would be difficult to fix upon any number of lives which should be sufficiently large to admit of every limitation being effectuated, to which it would in some instances be desirable to give effect, and which number (if adopted as a general rule) would not be too large to operate as any useful restriction; such a regulation would be also open to the objection of being arbitrary.”

The next suggestion was to limit the lives to those of persons taking interests in the settled property, but it was found impracticable to determine what sort of interest it should be to admit of the life of the interested party being considered within the rule.

“It would be difficult to exclude any interest on the ground of its minuteness; and yet if there were no such limit, it would be easy to evade the law by creating unsubstantial interests. The conclusion to which we had come on the subject of contingent remainders, increased this difficulty, for, when we determined that contingent remainders ought not to fail by the destruction of the estates which supported them, but should be preserved, after the manner of executory limitations, until their vesting, it became necessary to provide that the law against perpetuities should not be thereby infringed, and then immediately arose the difficulty of determining how the lives of persons taking estates prior to the contingent remainders could be brought within any practicable definition of the lives of parties interested. Again, the lives on which shifting

limitations are to take effect, are frequently the lives of persons quite unconnected with the settled property. To meet such cases, therefore, it would be necessary to admit of some unconnected lives; and that brought back the difficulty of determining to what number of such lives the indulgence should be extended."

These reasons must be allowed to be of great weight, if not unanswerable; and yet it is worthy of remark that the suggestions here declared impracticable were made by practitioners of the highest authority, with greater confidence than almost any other suggestions in the Appendix. So difficult is it to foresee contingencies; so simple a matter to propose outlines of plans, and so embarrassing a one to draw them out into detail. Two modes, however, have suggested themselves, by which, it is thought, the present rule may be beneficially restricted. First, to declare that lives shall not be arbitrarily taken for the purpose of postponing the vesting of an estate; and, secondly, that lives shall not be made use of for the purpose of founding a term or period, within which to create future estates or interests, which (if limited to take effect out of an estate of inheritance) would be void as infringements of the rule against perpetuities.

"The former of these regulations is calculated to prevent the recurrence of such cases as that upon *Mr. Thellusson's will*, and one of those abuses which occurred in the case of *Bengough v. Edridge*. Such a regulation would at all events dispose of cases in which the lives of the members of the Houses of Parliament, or of the boys at a public school, or any other fanciful class of lives, might be assumed (an expedient which has sometimes been suggested as practicable within the present limits of the rule). This will also go far to effect the object desired by those who wish to limit the allowance to lives of parties interested; for whatever difficulty there may be in deciding who are parties sufficiently interested, there can be none in deciding what persons are entirely uninterested. However, as courts of justice might find it difficult in some cases to decide whether the lives were arbitrarily taken for the purpose of postponing the vesting of an estate, we think it ought to be declared, that all lives shall be deemed to be arbitrarily taken, unless the contrary shall ap-

pear in the instrument. As to all parties interested, and all those whose life or death may furnish the motive for a limitation, it will necessarily appear that they are not arbitrarily taken. In all other cases it is fit that the motive and object (if any exists) should be made apparent.

“The second regulation would prevent the recurrence of the other abuse which occurred in *Bengough v. Edridge*, and will also have the effect of ascertaining the application of the rule to settlements of property held on leases for lives. Such leases being ordinarily renewable, settlements of them are in truth not settlements of a limited interest; but in all cases the lives existing in the lease may, in some sense, be considered as arbitrarily taken to furnish a period, during which the rule of law may be substantially, although it is not formally, transgressed.”

As to the period of perpetuity, exclusive of lives, the Commissioners propose that a gross term of twenty-one years shall be allowed, thus deciding the doubt formerly noticed in favour of accumulation. They admit that the period was first adopted in order to allow for a minority, but state that in cases where no lives occurred (for instance, the case of a devise to take effect three years or ten years after the death of the testator) it was early considered that the limitation would be good if the period of suspense did not exceed twenty-one years, and then contend that this period must have been selected by analogy to the period of minority, and that the circumstance of its being so selected in these cases appears to them “to furnish a strong argument in favour of admitting a gross term, in cases where it is to be taken in addition to a life or lives.” We certainly do not see the strength of this argument, nor, unless where the rules in question are related in practice, can we ever allow arguments drawn from bare analogy or similarity to be strong. But as many cases are conceivable, in which beneficial family arrangements would be facilitated by the power of tying up property for a term in gross after lives in being, it is hardly worth while to cavil at the grounds upon which that power is confirmed.

The embarrassing question whether limitations tending to perpetuity should be void *in toto* or partially sustained, has been solved with great ability in the Report. To meet the

difficulty, it has been found necessary to classify the various sorts of limitations which may offend against the law.

“ In some cases where the limits are exceeded, there is no difficulty in separating the excess, as in the case of a limitation to vest at the age of twenty-five, by making it vest at twenty-one. In some cases the separation is impossible, the limitation being in its nature such, that the excess cannot be precisely ascertained, as the case of a limitation to the eldest son of an unborn child.

“ In other cases the excess may be separated in more than one mode, and the difficulty is to decide which ought to be adopted. Thus, a limitation after an estate for life to an unborn child, to vest at the age of twenty-five, may be supported in either of two ways; 1st, if the child should attain twenty-five in the lifetime of the tenant for life; or, 2dly, by cutting down the age for vesting to that of twenty-one. In such a case it would be impossible for any court, without the aid of a legislative rule, to determine in which mode effect ought to be given to the limitation. It will therefore be necessary to specify the cases, and the mode in which effect is to be given to limitations exceeding in their terms the rule against perpetuities.

“ Upon examination, it will appear that there is a principle upon which this can be made. There are two sorts of remoteness, as the term is applied to the limitation of future estates: Remoteness, as it regards the event on which the limitation is to take effect; and remoteness, as belonging to the objects in whose favour the limitation is to operate. A limitation, to take effect after a general failure of issue, is an example of the former; a limitation to the son of an unborn son, of the latter.

“ Where both of these concur, as in a limitation after a general failure of issue to the son of an unborn person, it is of course impossible to support the limitation in part; it must be wholly void. Where the event is within the proper limits, but the object of the gift or trust is unascertained, or where the event is too remote, but the gift or trust is in favour of an existing person, the limitation may be partially sustained.”

On turning to the Propositions it will be found that the

above principle has been very ingeniously applied to preserve as much of attempted limitations as possible ; and it is also suggested that executory or future limitations, to take effect in possession after estates tail, may be saved, in case they become vested during the continuance of the estate tail, or of any preceding estate-tail,—on the simple principle, that as every estate-tail may be enlarged into a fee within a period not exceeding the limits, any limitation to take effect after it, cannot in substance have any tendency to a perpetuity. Amongst other minor propositions, is one for modifying or relaxing the rule in the case of an estate or interest to arise under a trust to be executed during successive minorities.

“ At present, if a trust is created with reference to minorities generally, so that it may, in its fullest extent, be understood as referring to minorities in a third generation, it is considered void from the beginning.

“ This might be treated as a case of construction, and the limitation might be deemed to mean only such minorities as must be within the limits. But we have preferred treating it on a distinct principle. The second minority must always be the effect of accident, which cannot be prevented ; and there can be no harm done by allowing such a trust to be good, till some person in the line of succession attains the age of majority. The only purpose of such a trust, which is likely to occasion inconvenience, is that of accumulation, and that is regulated by the wholesome provisions of an existing statute. These it will be proper expressly to preserve,”

*Powers* are said to form one of the most difficult subjects of consideration with reference to the rule. Cases in which the power is in fact a trust, are dismissed at once as coming within the rules applicable to trusts. As to powers, strictly so called, it is proposed that where the power is to be exercised at several specified times, or any one of several specified times, or in favour of all or any of several specified objects, it should be good, as to its exercise, at such of the times, or in favour of such of the objects, as may be within the proper limits, and void only as to any other exercise of it. They consider such a power as, in effect, several powers. But where there is no express limit to the exercise of the power, and the

power is not tantamount to the absolute ownership, they propose to render it void, except in cases particularised. Where, however, the exercise of a power, unlimited as to time, is to be controlled by the consent of the owner of the estate, a different principle is acted on, and much greater latitude allowed. Common law interests, except conditions as between landlord and tenant, and provisoes for the cesser of terms, with the same exception, are to be brought within the scope of the law. We give the concluding paragraph of this section as it stands.

“ By the alterations we have now had the honour to propose to your Majesty, the law relating to contingent remainders, and to future estates and interests, and to the intricate subject of perpetuities, will, as we trust, be relieved from many of the difficulties with which it is now beset, and many of the anomalies which at present exist in regard to it will be removed. The destruction of contingent remainders, without the act of the parties claiming under them, will be rendered impossible; the creation of future estates considerably facilitated; and all estates and interests will be rendered alienable. The convenience of parties making settlements or testamentary dispositions of real estate will be consulted; and at the same time the limits within which the settlement of property may be effected by means of future estates, or the operation of future provisoes or conditions, will be more accurately defined, than they appear to have hitherto been, and rendered more uniform in their application to every description of estate, interest, or right, known to the law of England.”

*Covenants.*—This head occupies a considerable space in the Report; but we shall be able to give the substance of it without taxing the reader's patience too far, as the defects are obvious and the remedies plain. After defining this description of contract, and expressing an opinion that the distinction between real and personal covenants depends exclusively upon the fact of their relating or not relating to land,<sup>1</sup> the Report proceeds—

<sup>1</sup> Some writers consider those only to be covenants real of which a specific performance could have been enforced at common law. Com. Dig. Cov. A. 2. The



“ In general a covenant can only be constituted by a deed under seal; it is an obligation of the nature of a specialty, being always binding upon the covenantor, his executors and administrators (that is, on his personal estate), and upon his real estate in the hands of his heir or devisee when the heirs are named; it is also binding in particular cases on other parties claiming property to which it relates from or through the covenantor, that is, on his assigns; and the benefit of it when it relates to real property, may also, in particular cases, be transmitted from the covenantee to his assigns of that property.

“ This whole branch of the law of covenants we now propose to examine. It is of course of great importance that the party who is really interested in the subject matter of the covenant, should be the party entitled to the remedy for breach of it; and on the other hand, that when it relates to specific property, such remedy should be had against the party having the means of performing it; in other words, that the covenant should, in technical language, *run with the land*, both as against those who stand in the place of the covenantor, and in favour of those who stand in the place of the covenantee. As to both, the law is at present defective, or imperfectly settled.

“ So far as the interest to be derived under a covenant is imperfectly transmissible, we have no great difficulty in suggesting the means of improving or settling the law; but there is considerable difficulty in determining the extent to which the assigns of the covenantor can be charged with the obligation.

“ We propose to examine the law, 1st, As it respects covenants between parties in the relation of landlord and tenant, or lessee and reversioner; and, 2dly, As it respects covenants relating to land, or the title to land, when such relation does not exist.

“ The authorities lay down, 1st, That in order to make a covenant run strictly with the land, so as to bind the assignee, or give him the benefit without his being named, it must

Commissioners seem to think that the specific performance of covenants was unknown at common law.

relate directly to the land, or to "a thing in existence, parcel of the demise;" 2dly, That where it respects a thing not in existence at the time, but which when it comes into existence will be annexed to the land, the covenant may be made to bind the assigns by naming them, but will not bind them unless named; and 3dly, That when it respects a thing not annexed, nor to be annexed, to the land, or a thing collateral, or in its nature merely personal, the covenant will not run, that is, it will not bind the assignee, nor pass to him, even though he is named.

"These rules appear to have been originally laid down with reference to leases, but authorities are not wanting, in which they have been treated as applying equally to cases not involving the relation of landlord and tenant. They are usually laid down as constituting the whole of the settled law on this subject, and appear to apply equally, whether we consider the *burthen*, or whether we consider the *benefit* of covenants.

"First, As to covenants in cases where the relation of lessee and reversioner subsists between the parties.

"We must divide these into,—

"1. Covenants entered into by the lessee.

"2. Covenants entered into by the lessor.

"And again we must, in considering each of these branches, distinguish between, 1. the burthen, and, 2. the benefit of the covenants."

*As to the burthen of Covenants entered into by the Lessee.*

Most of the covenants entered into by lessees fall within the first and second of the rules above mentioned. Thus, covenants to pay rent, repair, &c. run with the land, and bind the assignee whether named or not. Covenants to erect buildings, plant trees, &c. on the demised lands, fall within the second rule, and are generally made binding on the assignees by express words. In many cases, however, covenants of the third class are entered into by lessees, as, for instance, covenants to haul coals to the lessor's house, or grind corn at his mill, or buy or sell stock on a farm at a valuation, &c. &c.; and these are not binding on the assignee even though named. The Commissioners regard all these as artificial

distinctions, and propose that all covenants should be binding on the assignee, unless an intention to the contrary be expressed or is to be implied from the lease. It is no more than just as respects the landlord, that whoever takes the lease should be bound by the terms of it; whilst the assignee will have no cause to complain, as he will accept the liability with his eyes open; and, indeed, it is even now the practice to make every successive assignee bind himself to perform all such covenants, though in a clumsy and circuitous and often ineffectual manner. Such are the reasons given for the alterations, and they appear to us to be sound.

*As to the benefit of Covenants entered into by the Lessee.—*

The right of the assignee of the reversion to bring covenant depends partly on the common law<sup>1</sup> and partly on the statute 32 Hen. 8, c. 34, and considerable uncertainty has prevailed concerning it. For example, it was not long since made a question whether a remainder man, suing on a covenant contained in a lease made by a tenant for life under a power, was or was not an assignee within the meaning of the enactment.<sup>2</sup> To remove doubts of the kind, and carry out the principle on which the lastmentioned suggestion is based, the Commissioners propose that the benefit of every covenant should pass to the assignees, unless a contrary intention appear.

*As to the Burthen of Covenants entered into by the Lessor.—*

The only express covenant entered into by lessors which can be considered universal, is the covenant for quiet enjoyment, and it is said that there are very seldom any others but such as relate to the land, and consequently are binding on the assignee or grantee. But following the same principle, that he who takes the benefit ought also to bear the burthen, the Commissioners are of opinion that covenants, not relating to the land, should also bind the assignee or grantee to the extent of the value of the reversion. Such covenants, they contend, may be reasonably considered as

<sup>1</sup> Per Bayley, J. in *Vyvyan v. Arthur*, 1 B. & C. 414.

<sup>2</sup> *Isherwood v. Oldknow*, 3 M. & S. 382.

part of the consideration for the rent. They limit the liability to the value of the reversion, as well because devisees and others frequently become seised of the reversion without having the means of knowing the obligations imposed by the lease, as that "To declare him bound beyond that would be to impose on him a greater degree of liability than is imposed by the common law on the heir of the covenantor, and by the statutes 3 & 4 W. & M. c. 4. and 1 Will. 4. c. 47, on his devisees, for both those classes of representatives are bound only to the extent of the assets they may derive from the ancestor or testator, and of course the reversion must be the only assets which the assignee of it, as such, will derive from the covenantor."

It is further proposed to give a remedy by suit in equity where the reversion shall have become divided amongst different persons, that being the only effectual remedy in such cases; and to provide that, as between the grantor or lessor and those who take the reversion under him, the latter should be primarily liable in the absence of any declaration to the contrary.

*As to the Benefit of Covenants entered into on the part of the Lessor.*—The first proposition under this head, that the benefit of covenants entered into on the part of the lessor should run with the land, is but the necessary result of the immediately preceding part of the Report; but a good deal more must be done to place lessors in a satisfactory position. It sometimes happens, where the immediate reversion on a lease is a term or other particular estate, that it becomes merged in some other estate in the same land; in which case, not only the benefit of the covenants, but the rent and all remedies for it are lost. This being the mere result of a technical rule, without a shadow of foundation in reason or expediency, the Commissioners very properly propose that the merger should have the effect of transferring the rent and covenants, and all other remedies, to the person in whose estate the reversion merges.

The rule in *Dumpor's case* (4 Rep. 1 K. 6,) must be pretty well known to the practitioner. It was there decided, that when under a condition restraining assignment without license, a

license had been once given, the condition was determined; and the law is the same with respect to a covenant to the like effect, although, as the Commissioners remark, there seems no reason why such a covenant or condition should not be held to run with the land, and be binding, from time to time, on such persons as might become assigns of the lease, with the consent of the landlord, according to the view taken by Sir William Grant in *Weatherall v. Geering*.<sup>1</sup> The law in this respect has been already altered in Ireland by the well known Subletting Act, (7 Geo. 4, c. 29,) and though that Act is about to receive some important modifications, there can be little doubt of its beneficial effects so far as the mere contravention of the rule of *Dumpro's* case is concerned. After briefly stating its inconveniencies,—that in most cases the operation of the rule is a surprise upon both parties, that it gives rise to a great deal of litigation, and that, though never judicially extended to any other condition or covenant than that against alienation, it seems equally applicable to all other covenants and conditions by which the license or consent of the lessors is made requisite for doing any particular act,—they propose enacting that license or consent shall only authorize the particular act licensed or consented to, and that the covenant or condition shall remain unimpaired by the individual dispensation.<sup>2</sup>

The last proposition on this head is a highly important one, about which some doubts may exist. We shall therefore copy the observations relating to it:—

“ It is held that covenants and conditions in restraint of assignment are not binding on assignees in bankruptcy, or under the Acts for the relief of Insolvent Debtors, or in cases of sale by the sheriff under writs; but whether the effect of this doctrine is to discharge the covenant or condition altogether, or whether it continues binding on purchasers from such assignees or from the sheriff, is a point which has been little distussed. The argument in all these cases has been the same; namely, that the assignment is made in the discharge of a duty imposed by the law.

“ It may be urged that a landlord should not lose a benefit

<sup>1</sup> 12 Ves. jun. p. 511; and see *Brummell v. Macpherson*, 14 Ves. p. 173.

<sup>2</sup> See Propositions, post.

which he has carefully stipulated for, on account of an alteration in the circumstances of his tenant. But then it is to be remembered that the landlord may protect himself by additional stipulation, and it may with reason be thought that the protection of creditors who have trusted their debtor, in reliance on his apparent property, ought to be a paramount consideration, and more especially as the insolvency of the debtor may have been occasioned wholly or in part by expenditure in improving the leasehold property, and as there is no room to suppose that the landlord would, in general, be injured by an assignment to a person paying a valuable consideration, and taking the lease subject to all the covenants contained in it.

*“After much consideration,* therefore, we propose that it should be declared that sales by assignees in bankruptcy or under the Insolvent Debtors’ Act, or by the sheriff under process of execution, are not breaches of covenants and conditions not to assign, but that purchasers taking assignments from assignees, sheriff, executors or administrators, should become liable to such covenants and conditions as well as to all others in the lease.”

It may safely be taken as a general rule with regard to professional opinions, that the words “after much consideration” imply, either that the opinion-giver is not quite satisfied with his own reasons, or that he has no reasons to give; and the insertion of these words by the Commissioners have led us to examine this proposition with much consideration ourselves. We certainly are not quite satisfied with the justice of the declaration proposed, and we think one reason for it, that the insolvency of the debtor may have been occasioned wholly or in part by expenditure in improving the leasehold property, a little overstrained; but as it is impossible to secure the landlord in all cases without doing injustice to the general creditor in some, and subsequent purchasers are to be made liable to the covenants, the alteration may be on the whole a prudent one.

The Commissioners next proceed to consider covenants relating to land, in cases where the relation of landlord and tenant, or lessee and reversioner, does not exist; “the law

with respect to which," they say, "cannot so easily be put upon a right footing, as with respect to those hitherto considered." They class such covenants thus;—

"1. Covenants made *with* the owner of the land to which they relate.

"2. Covenants made *by* the owner of the land to which they relate.

"3. Covenants relating to the custody and production of deeds, and muniments of title, where different parties are interested in them, which class of covenants is in some respects different, and appears to be open to a different sort of remedy, from all others.

"1. The most ordinary instance of the first branch of covenants is found in the usual covenants for title; other instances of the same sort are special covenants to indemnify against existing charges which affect the land, to get in outstanding estates, or to procure further assurance.

"In considering the *burthen* of these covenants, no difficulty can arise, for they are in their nature general obligations binding on the covenantor and his real and personal representatives, but cannot be binding on any particular parties as assignees. We have therefore only to consider in this place the *benefit* of such covenants.

"Covenants for title have in modern practice supplied the place of warranties, from which they principally differ in this, that the remedy for defect of title under a warranty was the recovery of other land of equal value, while the remedy at law upon a covenant is the recovery of pecuniary damages. Whether these covenants are to continue to be expressed at length as at present, or are to be made to arise by implication or construction from other words or clauses, it is material that the benefit of them should be made to run more perfectly than they now do with the land to which they relate, or (as we have already expressed it) that the party really interested in the land should be entitled to the remedy for breach of the covenant."

It is therefore thought necessary to remove by a legislative declaration a distinction which, notwithstanding Coke's authority,<sup>1</sup> may still be supposed to exist between those cases where

<sup>1</sup> Co. Litt. 324. b.

the covenantor is a party by whom the estate is or has been conveyed, and those where he is a stranger to the estate. Doubts also are said to exist as to whether, when the statute of uses transfers the seisin, the benefit of the covenants invariably accompanies it; for instance, whether persons claiming under powers become entitled to the benefit of covenants which run with the land. Here again a legislative declaration is thought necessary, and the Commissioners conceive it advisable to apply some remedy to the case, where (as frequently happens<sup>2</sup>) the fee is conveyed to a releasee to uses, and the covenants are entered into with the purchaser, so that he being merely *cestui que use*, the covenants became covenants in gross, and separated from the land. The general recommendation stands thus:—

“ We recommend that in all cases the benefit of covenants entered into with the owners of land, and relating to the same land, shall run with the land for the benefit of every person taking the land, or any partial estate or interest in it, either under the covenantee, or under any act of the covenantee, or under any assurance, by, through or under which the covenantee may claim, (notwithstanding any want of privity of estate with the covenantee, and whether the title of such person arises by way of transfer of seisin, or by way of use, or under the exercise of a power, or otherwise, and whether the covenantor had or had not any previous estate or interest in the land.)

“ 2. With reference to covenants entered into by owners of land, we have to consider only the *burthen* of them. Of such covenants some have relation to interests possessed or acquired by the covenantee, independently of the covenant; such as a covenant to pay a rent-charge issuing out of the land, or to maintain a road over it; others are not connected with any such interests in the land, as a covenant by the owner of a particular close, that it shall never be built on, but always remain an open space. We shall consider these separately, though the alterations we have to propose will apply equally to both.”

<sup>1</sup> Should the Bill for amending the law of Dower pass, this mode of conveyance will probably go out of use.



Whether the burthen of such covenants, of either description, runs with the land so that an action of covenant at law can be maintained against an alienee, is treated by the Commissioners as a moot point: though the case of *Roach v. Wadham*,<sup>1</sup> is allowed to bear very strongly towards the affirmative side of the question. They sever the Gordian knot by striking the groundwork of the distinction away:—

“ We have been led to consider whether there is any good reason why the burthen of covenants of any description, entered into by the owners of land, should in any case run with the land, so far as concerns the legal remedy. In the case of the rent-charge, or of the road, the person entitled to the benefit may secure himself in the enjoyment of it by more express remedies. Powers of distress are usually reserved (and when not reserved are given by statute) for enforcing payment of rents; trespass will lie for the interruption of a road; the addition of a remedy by an action of covenant against the same persons, who would be the objects of the former proceedings, appears to be unnecessary. There are also cases in which the justice and policy of giving the remedy by covenant would be questionable, as where the object to be secured is a rent, and the value of the land charged with it has fallen below the amount of the rent. Upon the whole, therefore, we think it will be most expedient that the legal remedy by action of covenant should not be given in these cases, as well as in those we are about to discuss.”

The next class of covenants discussed are covenants entered into by the owners of particular land with the owners of other neighbouring or adjoining land, that the land shall not be built upon or planted, or otherwise imposing restrictions upon the mode of enjoyment of land in favour of persons taking no property in such land.

“ In modern times such covenants are of frequent occurrence, in cases where the areas of squares or public walks are to be preserved, or where an uninterrupted view of the sea, or of open country, is to be secured to the owners of adjoining houses. Doubts, nevertheless, appear to have been exten-

<sup>1</sup> 6 East, 289.

sively entertained both as to the efficacy of such covenants for the purposes they are intended to answer, and as to their validity. With respect to the former the principal ground of doubt has been, whether they would run with the land so as to bind all successive owners of it. Judged by the usual rule, (and supposing the rule to be applicable) perhaps this doubt may be thought to be unfounded, for they relate directly and immediately to the land. If such a covenant is not binding, at least in equity, on an assignee of the land, a title to property, the enjoyment of which materially depends upon it, must obviously be defective.

“ It does not very clearly appear under what impression as to their effect such covenants have been introduced or sanctioned by practitioners; probably they have seldom been viewed as creating at law any other than a personal obligation. We are not aware of any instance in which an action at law upon such a covenant has been brought against an assignee of the land referred to in it. In a few cases the subject has been brought before Courts of Equity, by suit against an assignee of the land; in some of these cases, the Court has refused to interfere by way of injunction, but the validity of the covenant, or its binding the assignee, has never been negatived by decision.

“ Practitioners have in many cases resorted to other contrivances for attaining the same object, such as vesting the land, or a long term of years in it, in trustees upon trust to continue it in the state intended to be guaranteed, or the creation of a rent with powers of distress and entry to arise on the taking place of any alteration in the circumstances of the land.”

It is also doubted whether such covenants be not open to the objection of creating a perpetuity.<sup>1</sup> In consequence of these numerous grounds of doubts, private acts of Parliament are frequently obtained to effectuate the object in view.

“ These covenants (say the Commissioners) being thus of frequent occurrence, and of great importance, we have given

<sup>1</sup> There is an instance of such a covenant in Fitzg. N. B., 8th edit. p. 341. Note by Hill. The covenant was held to be good, but the law of perpetuity was then unknown.

the subject very full consideration, with the view to suggest a means of putting the law respecting it on a more satisfactory footing.

“ To declare generally that such covenants create continuing obligations, as well at law as in equity, against the owners of land, appears open to much objection. It might not unfrequently lead to persons being rendered liable to an obligation, or at least sued for it, when the existence of the obligation was unknown to them.

“ A General Register (which we hope to see established, would remove much of this difficulty. An easy adaptation of the machinery of such a register would put this matter on a footing, in which persons interested under such covenants would be secure of the performance of them, and purchasers of land subject to them would have the means of knowing before hand the obligations to which they would become liable. It may indeed be mentioned as one of the advantages of such an establishment, that it would afford the only means by which the relief to be derived from the settlement of the law in this particular can be satisfactorily obtained.

“ On the other hand, a declaration that covenants of this kind are merely personal, or covenants in gross, (if it went the length of precluding the assistance of a court of equity,) would be almost entirely to destroy the use of them; for in that case the benefit would scarcely survive the generation in which the obligation was created. The security, so far as regarded the damages to be recovered at law, would be dissipated and lost.”

In this perplexity they appear to us to have hit upon about one of the worst measures that could be hit upon. They propose to declare that, at law and for the purpose of conferring a legal right of action, the burthen of such covenants shall not be considered as running with the land, but that the courts of equity shall be invested with a discretionary power of enforcing them, with reference to general considerations of expediency. Such is the Commissioners' plan for rendering any future application for private acts of Parliament unnecessary—brought forward, moreover, at a time when the propriety of assimilating legal and equitable rights as much as possible has been almost universally agreed upon. Such covenants

will, of course, remain binding as personal obligations, except where opposed to public policy.

Thirdly and lastly come Covenants relative to the production and custody of title-deeds; a subject which the Commissioners introduce by again alluding to the benefits they anticipate from a Register. They admit, however, that a great many of the inconveniences connected with this subject are not to be cured by a Register. We subjoin a short general description of these:—

“ The circumstances which, for a long period, have been gradually breaking up the masses in which landed property previously existed, and making it a subject of commerce, have led to the prevalence of this difficulty to a very serious extent. Perhaps no instance can be adduced in which the existence of an acknowledged evil has been longer put up with. The accommodating temper of parties, and an adherence to the spirit of private contracts (beyond what their legal import would always warrant) for a long time supplied the want of a legislative provision on this subject. But the great increase in the traffic in land, the alteration which has taken place in professional practice, and the greater degree of attention which minute points have received from courts of justice, have at length made this a very serious source of evil.

“ In a recent case, where the vendor had not the custody of the original deeds, but had a covenant for production of them, it was decided that the title was not marketable, because the covenant did not at law run with the land.

“ The consequence of the decision to which we have just alluded is, to create an embarrassment in conveyancing, which none but those engaged in its daily practice can be sensible of; for, of the numerous cases in which the muniments of title to property are to be resorted to under existing covenants for production of them, a very small proportion will be found in which the covenant could be said actually to run with the land to which the deeds relate. Provisions on this subject are now often inserted in conditions of sale by auction, and in private contracts, which, being prepared by unskilful persons or without due consideration, lead to difficulties and litigation.”

The maxim or principle on which it is proposed to legislate is this: "that when several persons are interested in the contents of a deed, each of them should have the means of compelling its production on all lawful occasions." This principle is supposed to have been acted upon to a considerable extent so long as warranties were in use; "and it has been concluded (says the Report) by many practitioners, that since the interference of courts of equity had been introduced upon its present footing, a direct and effectual mode of attaining the same object existed in Chancery. In favour of coparceners, and in cases of petition under decrees, this equity appears always to have prevailed; and in all other cases where the ownership of lands held under one title has become divided, there seems equal reason for it." The established practice in sales of estates by lots is stated to be, that the party purchasing the more valuable portion of the property should have the custody and covenants for the production of the deeds; and we are also informed, that although, when conveyances were made to uses, it was considered that the right to the custody of the deeds was in the feoffees to uses and their heirs, there must have been a clear equity in parties interested to compel the production of them.

The case between mortgagors is spoken of as peculiar. "The possession of the deeds is considered a substantial part of the security, and the mortgagee cannot be compelled to produce them, or allow their inspection, till his debt is paid. The remedy for any one claiming under the mortgagor, who may wish to obtain possession of the deeds, is to pay off the mortgage. The effect of this doctrine is, in many cases, to prevent the mortgagor from dealing with his equity of redemption; and upon the whole we see no sufficient reason for continuing this privilege to mortgagees."

The intended alterations are minutely set forth in the Propositions.

#### *A Period of Limitation for the Rights of the Church—*

This subject was hinted at in the First Real Property Report, but the Commissioners suspended their opinions upon it until the answers to certain questions submitted to the Bench of

Bishops should arrive. Eight of their lordships have since responded, and their communications appear in the Appendix to this Report. They are mostly unfavourable to the alterations proposed, but, with one or two exceptions, not bigotedly so; and the Commissioners, acting with laudable firmness in this respect, are notwithstanding unanimous that periods of limitation for all the rights in question are imperatively required. We will first abstract the views of the Commissioners, and then subjoin some passages from what, we fear, must be called the protests of the Heads of the Church. The principles upon which it is proposed to legislate in this matter are thus laid down:

“ In all proposed improvements in the law, property is to be respected, *and we feel not only that the property of the Church should be held quite as inviolable as that belonging to individuals*, but that the public interest is concerned in preventing incroachments upon rights which were conferred for the public good. We think it desirable that there should be a final settlement between the Church and the laity upon the basis of present enjoyments, but so as not to give sanction on either side to any recent usurpation which has not acquired the semblance of established right. This plan we consider will most nearly reconcile strict right with the interest of all parties.

“ The rule ‘*nullum tempus occurrit ecclesiæ*,’ while it has worked much vexation and prejudice to the laity, has by no means proportionably enriched the Church. As to the individual members of the ecclesiastical body, we believe that the attempts to revive ancient claims, with whatever success they have been attended, have on the whole been productive of personal inconvenience and pecuniary loss to the claimants, together over weighing their share of gain from the rights recovered. There is no doubt that conscientious motives often induce ecclesiastical persons both to advance, and to persist in prosecuting, claims on behalf of the Church, which private considerations would incline them to forego, or relinquish. We consider that the Church would be benefited by the removal of this species of snare.

“ The rule we have referred to, by its operation has

brought upon tithes a reproach which does not necessarily belong to them, and from which they ought to be rescued."

With the most earnest wishes for the well being of the established Church, we must again and again protest against the doctrine, that what is called its property stands upon the same footing as that of individuals. The present holders of Church preferments, and the owners of advowsons, have inalienable titles, undoubtedly, so far as their respective interests extend; but to suppose a mere legal or mental abstraction invested with inalienable rights, is ridiculous. By repeating such assertions, the clergy may weaken other property, but they certainly will not strengthen their own. The Report proceeds:—

"The principles upon which long enjoyment is held to be conclusive evidence of right, apply to this species of property as fully as to any other, and where the tithes are claimed either by a lay impropriator or by a corporation aggregate, whether temporal or spiritual, there seems no reason why the enactments which we have recommended respecting land, should not be extended to them. With respect to the claims of the clergy generally, however, a different course must be pursued. Prescription must be governed by peculiar rules as to property *extra commercium*, held by a succession of tenants for life, who are liable to want the information as to their rights which other owners may be considered to possess, and who are peculiarly liable to want the pecuniary means of enforcing those rights. This property is held too on a species of trust for the public, and the trust is left to the protection of individuals who have but a partial interest in enforcing its performance, and yet (unlike other trustees) must bear personally the whole expense and risk of the requisite proceedings. It is a consideration moreover not to be overlooked, that these individuals are liable to be influenced by many motives, operating either constantly, or for a long period, to deter them from demanding, and especially from hostilely prosecuting, their rights."

These observations are indisputably true; and no one who knows any thing of the country will deny that, independently of mere worldly motives, great sacrifices are made by the

clergy to preserve a good understanding with their parishioners.<sup>1</sup> "Yet," say the Commissioners, "experience shows that it is necessary to confine the effect to be given to all these considerations within moderate limit;" and they go on to corroborate the remark by an exposure of the evils to which the doctrine of presumption gives rise.

"For want of a positive rule, recourse has been had to the doctrine of presumptions, and these being presumptions of fact, are held in our law to be within the proper province of a jury. Accordingly, when there is evidence of enjoyment for a considerable period, the Court itself usually declines determining that such enjoyment is not of immemorial antiquity, and refers the question to a jury.

"The trial is of a very unsatisfactory nature. The evidence consists partly of documents preserved in various public repositories; the authority of these documents, as applying to the point in dispute, is open to various observations; and they are frequently of doubtful construction and lead to no satisfactory conclusion: another part of the evidence consists of oral testimony, as to the fact of enjoyment as far back as living memory reaches; and as to the tradition which has been received from deceased persons.

"Oral testimony in these cases is peculiarly liable to be affected by the inclination of the witness, and of those from whom his information was derived, and more of arbitrary discretion, as to its weight and effect, must be assumed by those to whom it is delivered, than is likely to be exercised in other cases. The consequence is, that the most careful examination of the case in a question of tithe before trial will not enable a party to anticipate with confidence the result of an action, and that the unsuccessful party has frequently sufficient grounds for dissatisfaction with the verdict to tempt him to endeavour to set it aside, or to take the chance of another action on the same question. Thus litigation is prolonged and multiplied, and, the rules of law conflicting, not only with the interests, but with the feelings, and passions, of jurymen, scandal is

<sup>1</sup> "I have had formerly much to do with tithes, and always thought the clergy were more sinned against than sinning."—Mr. Bell, App. to 1st Rep. p. 247. We quoted this once before, but in the present state of the public mind such testimonies should be diffused as widely as possible.



sometimes brought upon the administration of justice. Upon the whole, a decided advantage is given to modern usage against ancient right, and the *nullum tempus* rule is in effect repealed by a process of the most mischievous description to all parties concerned, but especially to those for whose protection it is intended.

“ We believe that these evils admit of no remedy but fixing in this country a period of prescription for the Church.”

They add, what we formerly stated,<sup>1</sup> that there is no other country in Europe, Catholic or Protestant, in which there is not a period fixed for barring ecclesiastical claims; and ingeniously suggest that until the 9 Geo. 1, the *nullum tempus occurrit regi* doctrine was supposed absolutely necessary to protect the rights of the Crown, but that no public loss has resulted from the abrogation of it.

The subjects to be considered in framing a Statute of Limitations for the Church are—1. The entire exemption of land from tithes. 2. Moduses, or customary payments in lieu of tithes. 3. Compositions real. 4. Glebe lands. A few sentences will be sufficient for each.

1. *Exemption*.—As the law now stands, nonpayment of tithes for any period whatever, is no ground of exemption. The land-owner can only discharge himself by proving that his land anciently belonged to a religious house of a particular description.

2. *Moduses*.—Moduses are supposed to have arisen from agreements of immemorial antiquity between the tithe owner and the tithe payer, for their mutual benefit; such agreements having been anciently permitted by the law. “ Where these customs exist,” say the Commissioners, “ they ought to be respected as much as the right to tithes in kind where there is no modus, or as the right to the soil itself.

“ Yet the rules laid down by courts of justice on this subject render many cases of modus open to question, and have often caused Moduses, which had subsisted without question for centuries, to be set aside. The most formidable objection to a modus is rankness. To be valid, a modus must be

<sup>1</sup> 3 L. M. pp. 70, 71.

deemed to have subsisted from the reign of Richard I. as the period of legal memory, and if the payment be considered greater than the tithe of the articles covered by the modus was then worth, it is set aside notwithstanding the uncertainty of such speculations, and the possibility that the owner of the land, out of love to the Church, or for the good of his own soul, may have agreed to pay annually in lieu of tithes a larger sum than the tithes were then worth."

It seems unnecessary to copy the statement in the Report as to the amount of litigation occasioned by the present law of moduses, and the prejudice it excites against the Church. We shall only copy one forcible remark:—"Whenever the incumbent succeeds in setting aside a long established modus, there is a strong feeling that injustice is done, for he accepted the living when the modus prevailed, and the advowson and all the land in the parish have been probably repeatedly sold on the basis of the modus, so that when it is set aside one party loses what he bought and had long enjoyed, and another gets what he had not bought and never expected to enjoy."

To take one example amongst many, it is said, that a modus was recently set aside which had subsisted ever since the reign of Edward II. by the discovery of a document which showed that it originated in that reign; and the curious in such matters are referred to the cases below.<sup>1</sup>

3. *Compositions Real*.—"This differs from modus principally in the time of its commencement. It is an agreement for a commutation of tithes that might have been made with the consent of the incumbent, patron and ordinary at any time prior to the 13th of Elizabeth. It is not liable to the objection of rankness.

"By the rule, however, now established, a composition real is not to be presumed from any length of usage consistent with it, but it must be established by proof or positive evi-

<sup>1</sup> See *Lord Kensington v. Pugh*, 1 Younge, 125. *Lediard v. Anstie*, 3 Younge & Jervis, 548. *Short v. Lee*, 2 Jac. & Walk. 464. *Norton v. Hammond*, 1 Younge & Jervis, 94. *Fisher v. Lord Graves*, 1 M'Leland & Younge, 362. *Dennison v. Elsley*, 1 M'Leland & Younge, 1. *Ross v. Aylesbury*, not yet reported. *Lambert v. Fisher, Kirkby's Rental Case*, before V. G. M. T. 1830.

dence of the existence at some time of a deed which must at least be as old as the 13th of Elizabeth, and may be several centuries older."

This doctrine is also condemned as militating against the general maxim of the law, that what has long existed shall, in favour of peaceable enjoyment, be presumed to have a legal origin.

*4. Glebe.*—Disputes as to glebe are rare, but do occur occasionally, and the law relating to it is extremely unfavourable to the laity. A period of adverse enjoyment, which should outweigh any evidence of prior title, is therefore alleged to be necessary; and the Commissioners think that "It would likewise be proper to make some regulation respecting land given to a parson irregularly for tithes, and land irregularly exchanged for glebe land, where the tithes or the glebe land have been afterwards claimed; for instances occur in which the parson recovers the tithes and retains the land given in lieu of them, or where he recovers the glebe land and retains the land received by his predecessor in exchange for it."

The Proposition as to these several matters is thus expressed in the body of the Report:—

"We propose a period of sixty years, and two incumbencies, with three years of a third incumbency, as to exemptions from tithes, and as to moduses, compositions real, and glebe lands. A succession of incumbencies is a necessary ingredient in the proposition, on account of the risk of a particular incumbent being careless or poor, or of there being collusion between the incumbent and the patron who has land in the parish; but any risk from the character of the individual incumbent, or from collusion between the incumbent and patron for more than two incumbencies in succession, cannot be allowed for without too great a sacrifice of the objects to be attained, and it seems not unreasonable to presume, that within the period we propose there may be an incumbent able and willing to assert the rights the protection of which is left in his hands.

"We have only further to remark, that there ought to be complete reciprocity between the parties, and that where tithes

have been paid for a certain time no exemption or modus should be allowed to be set up."

We now proceed to give the Questions submitted to the Bench of Bishops as to the subjects included in the Report, and such of their Answers as appear worth copying :

"Question 1.—Much complaint having at different times been expressed on account of there being no Statute for Limitation of Actions, relative to ecclesiastical property and to tithes in lay hands, Do you think there would be any insuperable objection to the enactment of a statute of limitation applicable to such property ?

1st. As to Ecclesiastical Property.

Q. 2.—Do you think a period of limitation might be fixed, compounded of a certain number of years and a certain number of incumbencies ?

Q. 3.—Do you think, with respect to moduses on non-payment of tithes, a period of fifty years, provided in that time the preferment had been occupied by three incumbents, would be a reasonable time ? —

Q. 4.—Or what other period of limitation would you propose ?

Q. 5.—On which party ought the *onus probandi* to lie ?

Q. 6.—Do you think where a composition real is pleaded, it is reasonable that the existence of such composition should never be presumed or inferred from any length of usage or enjoyment without production of the instrument itself, or evidence of its having existed, bearing in mind that such an instrument must appear to have been executed between the beginning of the reign of Richard I. and the 13th of Queen Elizabeth ?

Q. 7.—Do you see any objection to an enactment, that if a modus has existed and been acted upon for fifty years and three incumbencies, such moduses shall be binding, without regard to the time when it originated, or to the objections which might at present be made to it for rankness or any other cause ?

Q. 8.—Or what other period of limitation would you propose for this purpose ?

Q. 9.—Do you think that where a right to tithes comes in question, any and what different rule should be established as applicable to cases in which the patron of the living is proprietor of land in the parish ?

Q. 10.—Do you think it impossible to establish any statute of limitations as applicable to the church ?"

The Archbishop of Canterbury is general and brief. His only three answers are these :

" Answer 1.—" On a subject so materially affecting the interests of the clergy at large, I could not give an opinion without incurring a responsibility which I am not willing to take on myself, more especially without information sufficient to give me confidence in my own judgment. I shall be most willing to take into consideration any plan which shall be recommended by the high authorities of the law. At present I will only observe, that if the public convenience should require the sacrifice of a privilege which I conceive to have been not less useful to the church in preventing encroachments on her property than in recovering her rights and possessions when they had improperly passed into other hands, some method ought to be found for the previous settlement of all contested claims of exemption or modus, and for placing the property now possessed by the church on such a footing as to preclude its alienation, except in such cases as are authorised by law, for the future.

A. 12.—I think a distinction would be invidious.

A. 13.—I do not see that it is necessary."

*The Bishop of London :*

" Answer 1.—It is impossible to give an answer to so general a question. Each case must be looked at by itself. The principles upon which the statutes of limitation are grounded are not strictly applicable to the case of tithes, where there is a fresh account every year between the incumbent and the tithe-payer ; so that the only limitation which should be allowed would be, that an incumbent should be estopped from recovering unclaimed tithes for more than a certain number of years.

A. 2.—The question of a *right* to tithes is not a fit subject for a statute of limitation.

A. 3 & 4.—*Moduses* ought not to be settled by a statute of limitation. The whole question of moduses should be settled in a different way, before such a statute can be admitted.

A. 5 & 6.—If the *onus probandi* be taken off the tithe payer, it will be a very great hardship on the clergy, inasmuch as it will be a virtual denial of their common law right to tithes.

A. 7.—The greatest possible objection. *It would be a most iniquitous enactment.* It is quite notorious that moduses are frequently set up by great proprietors, and submitted to by poor clergymen from necessity, not from an acquiescence in their validity.

A. 8, 9, & 10.—I would allow of no limitation ; but in each case

where it might be desirable to settle finally the question of moduses, a special commission, perhaps, might be empowered to try the question, and to sanction any reasonable settlement of it. The trial of a modus by jury would be most unjust.

A. 11 & 12.—One and the same rule must be applied to all proprietors of tithes, whether ecclesiastical or lay.

A. 13.—The cases are not frequent in which such a statute would be required.

A. 16.—If an impartial and *cheap* tribunal for the settlement of this single question could be put into operation, it might admit of consideration, whether in that case *all* moduses might not be required to be brought before it and finally settled within 10 years, or be considered as permanently fixed."

The concluding suggestion has been under the consideration of the Commissioners, but was rejected by them on the ground of the tendency of such a measure to create delay and expense, and stir up many new disputes which would never otherwise have arisen. We find considerable difficulty in following his Lordship's reasoning in Answer 1; and we venture to hint, with all possible respect, that the term "iniquitous," in A. 7, is too strong.

*The Bishop of Worcester :*

"Answer 1, 2, 3, and 4.—Perhaps there may not be any insuperable objection to the enactment of a statute of limitations to ecclesiastical property, and for tithes in lay hands.

*Fifty years is sufficient, a hundred not too many.*

A. 5.—The *onus probandi* should lie on the person claiming the modus or exemption for the whole period of 100 years.

A. 6.—I think a composition real might be presumed, or enforced by usage without production of the instrument itself, or evidence of its having existed, if nothing appear against such usage from the 26 Henry VIII. an æra prior to the dissolution of the monasteries.

A. 7 and 8.—*Rankness* should certainly remain destructive of a modus, at any time, and after any number of years; but, except for rankness or fraud, a modus may be made binding, if existing, and acted upon for 100 years.

A. 9.—Some rule under this head may be framed, and should be, where the patron of the living is proprietor of lands in the parish.

A. 10.—I am inclined to think it not impossible to establish a statute of limitations applicable to church property.

A. 11.—In this case reference must be made to lay impropriators.

A. 12, 13, 14, and 15.—One hundred years and three *avoidances*, would perhaps be proper.

A. 16.—I have nothing further at present to suggest.

17.—*Legal memory*. *Vide* Answer to Question 6.

A. 18.—In some questions legal memory may perhaps be reduced to a certain number of years *ante litem motam*."

If fifty years be sufficient, a simple layman may be pardoned for thinking that a hundred years is too much.

### *The Bishop of Hereford :*

" *Answer* 1, 2, 3, 4.—Not many years since, a right to tithes was established, and composition or modus set aside, by appeal to a written document which had belonged to Glastonbury Abbey before its dissolution. This fact is a precedent sufficiently strong, to be a ground for allowing a party claiming payment of tithes, to go up, for papers and records in his favour, at least as far as the first year of Henry the Eighth's reign, such year being inclusively taken.

A. 5.—The common law of the land and positive laws, give to the parson a tenth of all things titheable throughout the parish in which his church stands. Whoever refuses to pay that tenth, must show cause why he is exempt. The *onus probandi*, that his plea for exemption is valid, must therefore lie on him.

A. 6, 7.—No composition or modus should be deemed valid, unless the payment of either can be proved by evidence of a written deed executed in the first year of Henry the Eighth's reign. The reason for fixing on that period in particular is, because, by the dissolution of religious houses and by the commencement of the Reformation, the reign of Henry the Eighth points out a signal and memorable epoch in the history of our country.

A. 9.—If, in the case here stated, were proposed the adoption of two different modes of proceeding, the one against the tithe-payer not patron, the other against a tithe-payer patron of a benefice, the language of the legislator should in effect be '*Trös Rutulussve fuat, nullo discrimine agetur*.' With regard to this case, the enactment of law and the application of law should be impartial. A legal rule for settling disputes about tithes should make no distinction in favour of patron or not patron."

This is a very singular communication indeed. The Com-

missioners themselves have taken the trouble of answering the first answer :—

“ It has been proposed, that the period should go back to the first year of Henry VIII., because not many years since a right to tithes was established, and a composition or modus set aside by appeal to a written document, which had belonged to Glastonbury Abbey before its dissolution. On the same ground, it might equally well be carried back to the reign of Edward II.; and if a period were to be fixed so far back as to let in all evidence which would now be available, we must adhere to the reign of Richard I., and allow things to remain as they are.”

His Lordship's second answer (A. 5) reminds us of Lord Tenterden's speech against the Catholic Emancipation Bill. He is asked what the law ought to be, and he tells us what the law is. The third (A. 6 and 7), proposing that “ no composition or modus should be deemed valid, unless the payment of either can be proved by evidence of a written deed executed in the first year of Henry the Eighth's reign ”—must have been misprinted. It is quite impossible that his Lordship could have written it as it stands.

The Bishop of Peterborough's answers being considerably longer than the rest, we must content ourselves with stating the substance of them. He presses the different position in which lay and clerical claimants, as already admitted by the Commissioners, are placed, and thinks that the onus probandi should lie with the person pleading the modus; that continued usage, and usage without variation, from the 13th Eliz. may be admitted as presumptive evidence of a composition real, without the production of the original document; that fifty years, even with three incumbencies, is not enough for any of the cases named, but that if we assign a certain number of years *ante litem motam* as the period, it ought not to be less than two hundred years for the establishment of a modus. Generally speaking, he admits that alterations as to all the subjects proposed in the queries are required.

*The Bishop of Lincoln :*

“ I think all the suggestions under this head, which relate to moduses, objectionable; less so, however, in the case of tithes in the hands of lay, than of ecclesiastical, owners; since many reasons



might prevent a clergyman from attempting to get rid of a modus, which could not operate on a layman. In my opinion a commission should be appointed, under the authority of Parliament, to try the validity of all existing moduses; and unless the party objecting to the modus brought his case before the commission within a specified time, (say five years) the modus should be deemed valid. With respect to a composition real, if payment can be traced up to the 13th of Queen Elizabeth, I think that it should be deemed valid.

"With respect to the right of Presentation. I see no objection to the limitation specified in Query 15.—'That there shall have been three avoidances, provided that those avoidances have occurred in a period of not less than fifty years.' The term of fifty years is specified in the ninth Decree of the Reformation, passed at the last Session of the Council of Trent."

The first proposition has been already discussed. The concluding paragraph confirms the views of the Commissioners. We have great pleasure in drawing attention to the next communication.

*The Bishop of Carlisle :*

"Answer 1.—So far from there being an insuperable objection to such a measure, I think it in every point of view desirable.

A. 2.—I should think three incumbencies, AND a period of 60 years, would meet the subject in view.

A. 3 & 4.—I would propose 60 instead of 50 years as a proper period, and three incumbencies; 60 years being fixed as the period by 9 Geo. 3, c. 16, as a bar even to the prerogative of the Crown; and as the King and the church, previous to this statute, were on the same footing, I would now urge that as a reason why, in any alteration, the same term of years should be fixed on.

A. 5.—On the party claiming the benefit of the modus; it would naturally fall on him after the tithe owner proved his general title."

[In his answer to the sixth question, which is long, his Lordship seems to lean to the opinion that the existence of the deed, establishing a composition real, at some time or other, should be proved.]

"A. 7 & 8.—I think it should not have existed for a shorter period than 60 years and three incumbencies; and this without any variation; but I do not think that even this period should remove every objection that might at present be made to the modus; for instance, a modus of 1d. for every *milch* cow will discharge the *tithe* of milch kine, but not of *barren* cattle; but was such an enactment to be made as is proposed, the tithe proprietor would be

barred from claiming for *barren* cattle, provided no claim had been for such cattle, and a modus of the 1*d.* for milch kine was set up as including barren cattle; but many instances might be mentioned stronger than this. I therefore suggest a modus, that has existed for 60 years and three incumbencies, should be liable to all the present rules of law, with the exception of *rankness*, and this, strictly speaking, is rather a rule of evidence drawn from the improbability of the fact, than a rule of law.

A. 9.—I cannot discover any reason why a different rule should be established, neither do I think it advisable that there should be.

A. 10.—I think the period of 60 years and three incumbencies as feasible as any that can be suggested."

*The Bishop of Gloucester :*

" Answer 1.—Some limitation may be adopted; but it will require caution.

A. 2, 3, 4 & 5.—So few incumbents are able or willing to hazard the expense of recovering their rights, and endeavouring to set aside moduses and compositions of the rankest kind, that I do not think such limitation (at least if it be meant to be carried forthwith into operation) would be sufficient; nor will I undertake to say what would be a reasonable time. The objection might perhaps be in some measure removed, if the limitation were to take place after a certain term of years.

A. 6.—It might suffice, if reasonable evidence can be produced, of its having been in force from the time of Queen Elizabeth.

A. 7 & 8.—See N<sup>o</sup>. 3. A fair opportunity should be given to incumbents, of recovering their rights, before the law becomes conclusive.

A. 9.—This is a case which seems to require some jealousy; though perhaps in legislating on the subject it would be difficult, or odious, to draw a distinction between such patrons and others.

A. 10.—Certainly I do not think it impossible.

A. 13, 14 & 15.—As the same objections do not apply to the case of advowsons as to that of moduses, &c., I see no objection to their becoming subject to some limitation. But in this case I think that the number of presentations or avoidances should be taken into the account, as well as the number of years. Without this precaution a term of 60 years might easily establish the claim of an intrusive patron.

Three avoidances and 60 years might perhaps not be objectionable.

A. 16.—If any measure could be devised which would settle

questions of this kind in a summary and conclusive manner, without eternal litigation and ruinous expense, it were much to be wished for. But I do not presume to suggest any particular measure.

A. 17.—I cannot but think that at the present day the reign of Richard the First is too distant an era of legal memory.

Some era however may probably be pitched on to which legal memory may be fairly said to extend; for, since the invention of printing, and the publication of reports, there seems little danger that legal memory should be obliterated."

On the subject of these communications we have only one observation to add. The reader will bear in mind, that it is the bounden duty of the bench of bishops to stand forth on all occasions as the champions of the real or supposed rights of the establishment, and see that it takes no harm—*ne quid damni respublica capiat*—from the heedless zeal of the innovator. To effectuate this object, they are frequently obliged to lean hard upon one side to counteract the undue pressure upon the other. For our own parts, we are in the habit of considering them as a sort of standing counsel for the church, and many of their publicly avowed opinions as professional; which, at the same time that it detracts something from their weight, must be allowed to take from them the greater part of their invidiousness. If their lordships' private unsophisticated opinions could be had, we believe they would not be found to differ materially from those of sensible laymen as to the matters in dispute, and, for these reasons, we think the Commissioners fully justified in not allowing their own enlightened views to be neutralised by episcopal dissent.

The Report concludes by stating that it was the original intention of the Commissioners to include the subject of Wills in it, but that the appearance of the Ecclesiastical Report has induced them to postpone the head of Testamentary Law.

H.

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## PROPOSITIONS,

(*Annexed to the Third Real Property Report.*)

## TENURES.

" *Escheat, &c.*—1. FREEHOLD land, held of a mesne lord, shall escheat for want of heirs to the Crown, in the same manner as if there had been no mesne lord, unless a quit-rent shall be payable to the mesne lord for such land.

" 2. Land, which shall escheat for want of heirs of a trustee or mortgagee, shall continue subject to the trusts or equity of redemption or incumbrances to which it would have been subject, if it had not escheated.

" 3. Land held in trust for a person dying intestate, and without heirs, shall be held by the trustee, in trust for the lord to whom the land would have escheated, if the deceased person had been seised of the legal estate, but subject to any other trusts subsisting therein.

" 4. An equity of redemption to which a person, dying intestate and without heirs, shall be entitled, shall vest in the lord.

" 5. A term of years in land, which shall have escheated or vested in the lord for want of heirs, shall, so far as the term shall be attendant on the inheritance, be held in trust for the lord.

" 6. A term of years not attendant on the inheritance, to which a person, dying intestate and without kindred, shall be entitled in equity, shall be held by the trustee, in trust for the Crown; but subject to the interest of any wife, and to any other trust subsisting therein.

" 7. An equity of redemption, to which a person dying intestate and without kindred shall be entitled in a term of years, shall vest in the Crown, but subject to any trust subsisting therein.

" *Tenures and Customs to be abolished.*—8. The Custom of Borough English, and all customs affecting lands held in Borough English, or in burgage, shall be abolished; and such lands shall be held in free and common socage.

" 9. The custom of Gavelkind, and all customs affecting lands held in Gavelkind, shall be abolished, and such lands shall be held in free and common socage.

" 10. In copyhold and customary lands, the modes of descent, according to the custom of Borough English and Gavelkind, and all other customary modes of descent, shall be abolished; and all copyhold and customary hereditaments shall be inherited in the same manner as lands held in free and common socage.

“ 11. In copyhold and customary lands of inheritance, all customs relating to Curtesy and Dower or Free Bench, so far as such customs differ from the rules of law with respect to Curtesy and Dower affecting lands held in free and common socage, shall be abolished; and all copyhold and customary lands of inheritance shall be subject to customary rights of Curtesy and Dower, or Free Bench, corresponding with the rules of law respecting Curtesy and Dower affecting lands held in free and common socage.

“ 12. The tenure of Ancient Demesne shall be abolished; and all lands held in ancient demesne shall be held in free and common socage. Courts of Ancient Demesne shall become Courts Baron; and the rents, fines, heriots, and services, to which the lands now held in ancient demesne are subject, shall be continued.

“ 13. No beast or other chattel shall hereafter be seized or demanded as a heriot in respect of any freehold, copyhold, or customary, tenement; but in every case in which a heriot (if one could be found) might now be seized or demanded, the sum of 5*l.* shall be paid by the succeeding tenant, and may be recovered, by the lord of the manor or other person who would be entitled to such heriot, by distress on the tenement in respect of which the same shall be due, or by an action against the person or persons entitled to such tenement.

“ *Enfranchisement of Copyholds.*—14. A person entitled to a manor for an estate of freehold in possession, or in reversion expectant on a term of years, but with the consent of the termor (if any), may by deed enfranchise any copyhold of inheritance parcel of such manor, in consideration of a yearly rate rent to be reserved by the deed of enfranchisement, or of the surrender to the lord of part of the copyhold tenement, or of a gross sum of money.

“ 15. A person entitled to a copyhold tenement of inheritance for an estate for life or other greater estate in possession, or subject to a lease for years, but with the consent of the termor (if any), may accept the enfranchisement of any such tenement or part thereof, and in consideration thereof, may agree to the reservation, by such deed of enfranchisement, of a yearly rent, or may surrender to the lord other part of such tenement, or may pay him a sum of money to be raised as hereinafter is mentioned.

“ 16. Any rent reserved in consideration of an enfranchisement may afterwards be extinguished, in consideration of a conveyance of part of the tenement out of which it shall be payable, or of a gross sum of money; and the person entitled to the manor and enfranchised tenement respectively, who according to the preceding Propositions would have been capable of granting or accepting the

enfranchisement of such tenement, if it had not already been enfranchised, shall be empowered in like manner to give or accept a release of such rent.

“ 17. Any rent reserved in consideration of an enfranchisement may, by the agreement in writing of the persons who would be capable of extinguishing such rent, be apportioned among different parts of the tenement out of which the same shall be reserved ; and any such apportioned part may afterwards be extinguished according to the last Proposition.

“ 18. Every rent reserved to the lord in consideration of enfranchisement, shall become parcel of the manor.

“ 19. The tenement, or part thereof, which shall be enfranchised, shall go and be held to the same uses as shall be subsisting in the same tenement immediately before such enfranchisement, or as near thereto as the different natures and tenures of the estates will admit.

“ 20. Any person empowered to obtain enfranchisement of a copyhold of inheritance, or to obtain the extinguishment of a rent, in consideration of a gross sum of money, may raise the same by charging the tenement to be enfranchised, or out of which the rent to be extinguished shall be payable, or any part thereof, with the sum of money agreed to be paid ; and for securing the payment of the sum of money so to be charged with interest, may demise the tenement to be charged unto any person or persons for any term of years, which term shall be made to cease, or be made redeemable, on payment within a reasonable time by the person or persons entitled to the said tenement, of the sum of money to be charged with interest for the same ; and the person making such charge shall covenant to keep down the interest during his ownership.

“ 21. Any gross sum, paid in consideration of an enfranchisement or extinguishment, under the powers hereinbefore proposed to be given, shall be paid to two or more trustees, to be approved of by two barristers of not less than seven years' standing, and shall, by such trustees, be applied in the redemption of the land tax, or in or towards the discharge of any incumbrance affecting the manor, or affecting other hereditaments settled to the like uses, or shall be laid out in the purchase of land, to be settled to the same uses as may be subsisting in the manor ; and, in the mean time, the money may be invested by the trustees, in their names, in three per cent. Bank annuities, or on the security, by way of mortgage, of the tenement which shall be enfranchised, or out of which the rent to be extinguished shall be payable ; and the dividends or interest

shall be paid to the person who would be entitled to the rents and profits of the land to be purchased, in case such purchase were made.

" 22. The word ' persons,' in the preceding propositions, shall include corporations aggregate or sole; but the powers hereinbefore proposed to be given, shall not be exercised by an archbishop, bishop, dean, or prebendary, without the consent of the chapter, or by a parson or vicar, without the consent of the patron and ordinary; and any gross sum to be given for enfranchisement or extinguishment in such cases, shall be paid to the Governors of Queen Ann's Bounty, in trust to be laid out in land, &c.

" 23. Provisions to be made for extending the powers to trustees, guardians, husbands, and committees.

" 24. Enfranchisements, or extinguishments, to be void at law, for fraud.

" 25. Enfranchisements and extinguishments shall be binding on incumbrancers, and the powers may be exercised by any such person, as aforesaid, notwithstanding any defect in title.

" 26. Every copyhold tenement, which shall be enfranchised by virtue of the powers proposed to be given, or otherwise, shall continue to form part of the manor; and every rent, reserved by any deed of enfranchisement, in consideration thereof, shall be a rent service.

" 27. No copyhold tenement, which shall hereafter be surrendered to the lord, or which he shall acquire by reason of escheat, or otherwise, shall afterwards be granted by copy of court roll.

" 28. No land, which has not already been held as copyhold, shall hereafter be granted by copy of court roll.

" *Copyholds.*—29. Where any doubts may be entertained respecting the identity or boundaries of freehold and copyhold lands, intermixed or adjoining together, and held in fee-simple, either by the same person or by different persons, the lord of the manor, at the request and expense of the owner or owners of the lands, shall cause a map and survey of the lands to be made and reduced into writing, and produced at the next or any subsequent customary court; and, at the same or any subsequent court, after such map and survey shall have been examined by the homage, and such evidence shall have been produced as the homage may think proper to require, the lord of the manor or his steward, and the person or persons entitled to such freehold and copyhold lands, by an agreement in writing, may determine what part of the lands, comprised in such map and survey, are the copyhold lands, and what part freehold; and such

agreement, when approved by the homage, shall be entered in the court rolls, and thereupon the lands described as copyhold in such agreement shall be copyhold, and the other lands of the copyholder, comprised in the said map or survey, shall be freehold; and such agreement shall be valid, notwithstanding the lord of the manor may be entitled only to a partial estate in the manor, or may be wrongfully in possession thereof,

" 30. Where the freehold of any tenement held by copy of court roll has been, or may be, separated from the manor, the copyhold shall afterwards pass by surrender and admission, as if the tenement continued parcel of the manor; and, for the purposes of this proposition, the freeholder shall be considered as the lord.

" 31. A Customary Court for taking surrenders and granting admissions of copyhold tenements, and for other proceedings relating to the conveyance thereof, may be held by any lord of a manor, or his steward, notwithstanding there may be no longer two copyhold tenements of the manor, and although no copyhold tenant be present.

" 32. Any person may surrender his copyhold tenement, by executing, either in or out of the manor, a deed attested by two witnesses, expressing the surrender thereof, and by the delivery of such deed to the lord or steward, either within or out of the manor; and the lord, or steward, shall give an acknowledgment of such delivery, and shall enter the deed in the court rolls.

" 33. The lord or steward of any manor may grant seisin of any copyhold tenement, and admit any person thereto at any time, and at any place out of court, either within or out of the manor, and shall enter such admission on the court rolls.

" 34. The lord or steward of a manor receiving any deed of surrender, shall be bound to give, to the person delivering the same, notice in writing of any prior surrender of the same tenement, which he shall not have entered on the court rolls.

" 35. A copyholder may let his copyhold tenement, or any part thereof, for any term of years not exceeding 21 years, in possession, at rack rent, without the license of the lord; and every such lease shall be valid and effectual, so far as the interest of the copyholder shall extend; and such lease shall not entitle the lord to a fine.

" 36. All copyhold tenements shall be subject to debts and specialties, in the same manner as freehold lands.

" 37. *Customary Freeholds.*—The several propositions relating to copyhold tenements, so far as they may be applicable, extend to customary freeholds."



## CONTINGENT REMAINDERS, FUTURE ESTATES, AND PERPETUITIES.

" 1. A Contingent Remainder hereafter created shall, in case of the destruction or determination of the particular estate, before the happening of the contingency, be capable of taking effect as if it had been at its creation, and shall thenceforth be deemed a future estate, and not a remainder.

" 2. Where a contingent remainder shall take effect under Proposition 1, the rents and profits, accruing between the destruction and determination of the particular estate and the taking effect of the future estate, shall, in the absence of a direction to the contrary, belong to the person or persons for the time being entitled to the first vested estate.

" 3. When a contingent remainder shall be limited to a class of persons described as children of some person or persons, and at the time when the same shall take effect in possession, the parent or parents shall be living, then the title or interest of the persons taking under such limitation shall open to let in after-born children.

" 4. An estate hereafter created shall not be void on account of its being made to depend on a possibility upon a possibility.

" 5. An estate of freehold, to take effect at a future time, may hereafter be created by any assurance by which a present estate of freehold may be created.

" 6. Any estate or interest which can be created by will in any chattel real, may hereafter be created by deed.

" 7. Every contingent remainder, springing, secondary and shifting use, executory devise, future right of entry for condition broken, and every other contingent and future estate and interest may hereafter (although the event on which the same shall depend may not have happened) be granted, assigned, devised and bequeathed, to the extent of the interest or chance of the person granting, assigning, devising or bequeathing the same; but this Proposition shall not authorise an estate or interest under a limitation to the heirs of a living person to be granted, assigned, devised or bequeathed during the life of such person.

" 8. The period during which the vesting of a future estate or interest in any hereditament, right, profit, or easement, may be suspended must not exceed the life of a person, or of the survivor of several persons born or *en ventre sa mère*, at the time of the creation of such future estate or interest, and ascertained for that purpose by the instrument creating the same, and twenty-one years to be computed from the dropping of such life, or the minority of some person *en ventre sa mère* at the dropping of such life, and ascertained for that purpose by such instrument; and every

such future estate or interest which shall not be made to vest within such period, shall (except as hereinafter is provided) be void.

" 9. In the construction of Proposition 8, the time of the death of the testator shall be deemed the time of the creation of an estate or interest created by a will, and the time of the execution of the instrument creating the power shall be deemed to be the time of the creation of an estate or interest created by the execution of a power not tantamount to the absolute ownership.

" 10. A remainder is not to be deemed a future estate or interest within Proposition 8.

" 11. A contingent remainder or other future estate or interest, the vesting of which shall be suspended during a life or lives arbitrarily taken for the vesting of such suspension, shall be void; and lives shall be deemed to be arbitrarily taken for the purpose aforesaid, unless the contrary shall appear from the instrument creating such future estate or interest.

" 12. A contingent remainder or other future estate or interest, which, if limited to take effect out of an estate in fee-simple, would be void under the rule against perpetuities, shall be void when limited to take effect out of any less estate.

" 13. A power so made that it may be exercised at any time beyond the period allowed for suspending the vesting of a future estate or interest, and not tantamount to the absolute ownership, shall (except as hereinafter provided) be void.

" 14. A future estate or interest limited to take effect in possession after the determination of any other estate or estates created at the same time, determinable upon a life or lives *in esse*, shall not be void if it vest at or before the dropping of such life, or of the last of such lives.

" 15. A future estate or interest limited to take effect after the determination of any estate or estates tail, or in defeazance of any estate or estates tail (other than a future estate or interest arising under the exercise of a power having precedence to the estate tail), shall not be void if it vest at any time during the continuance of any such estate tail.

" 16. A future estate or interest, limited to any person or persons *in esse* at the creation thereof, shall not be void if it vest during the life of such person or any of such persons.

" 17. A future estate or interest limited to a class of persons described as children of some person or persons *in esse* at the creation thereof, and to vest in some event not connected with the age of such children, shall not be void, if the event happen

during the life of such parent or one of such parents, or before the birth of any such child, being a posthumous child.

" 18. A future estate or interest limited to vest on the happening of any one of several events, upon some or one of which only the same might have been lawfully limited to vest, shall be deemed to be limited to vest upon such last-mentioned event, or upon any of such last-mentioned events only.

" 19. Where a future estate or interest shall be limited to vest on the event of a person not born, nor *en ventre sa mère*, at the creation of such future estate or interest attaining or not attaining an age greater than twenty-one, the settlor or testator shall be deemed to intend the age of twenty-one.

" 20. Where an estate or interest shall be made determinable either by the original limitation thereof, or by virtue of any proviso, condition or agreement upon the event of a person not born, nor *en ventre sa mère*, at the creation of such future estate or interest attaining or not attaining an age greater than twenty-one, the settlor or testator shall be deemed to intend the age of twenty-one.

" 21. An estate or interest limited or arising under a trust during the minorities of any persons being tenants in tail or in fee, shall not be void by reason of the trust not being expressly confined to the minorities of persons taking by purchase; but every such estate or interest (so far as it may be to arise during the successive minorities of any person, and the issue in tail or heirs of the same person) shall cease so soon as such person, or his issue or heir inheriting shall become adult; and nothing in this Proposition shall authorise or render valid any trust for accumulation beyond the limits within which such accumulation is by law restrained.

" 22. Where a power shall be limited to be exercised at several specified times, or any of several specified times, or on the happening of several specified events, or of any of several specified events, or in favour of several specified objects, or of any of several specified objects, at some or one of which times only, or on the happening of some or one of which events only, or in favour of some or one of which objects only the same might lawfully be limited to be exercised, the same shall be deemed to have been limited to be exercised at such last-mentioned time, or some or one of such last-mentioned times only, or on the happening of such last-mentioned event, or some or one of such last-mentioned events only, or in favour of such last-mentioned object, or some or one of such last-mentioned objects only.

" 23. A power without restriction as to the time of its being

exercised shall not be void if the same shall be limited to be exercised by or with the consent of the person or persons for the time being entitled to the land, but any such person or persons being tenant or tenants in fee or in tail may extinguish such power by deed or will.

" 24. A power over land subject to the limitations of a settlement made by the instrument creating the power, or by any prior instrument, and not limited to be exercised with the consent of the person or persons for the time being entitled to the land, may be exercised from time to time until some adult person shall become entitled in possession to an estate in fee or in tail under the settlement, and shall thereupon cease.

" 25. A power, the exercise of which may be enforced in equity in favour of persons whose estates or interests to be taken under the exercise of such power shall not be void under the foregoing Propositions, shall not be void.

" 26. The period during which an estate or interest in any hereditament, profit or easement (other than an estate or interest in tail) may be made determinable, either under the original limitation thereof, or by virtue of any power, proviso, condition or agreement, except as provided in proposition 27, must not exceed some period allowed for suspending the vesting of a future estate or interest, and every estate or interest in any hereditament, right, profit or easement, which shall be expressed to be made determinable either under the original limitation thereof, or by virtue of any power, proviso, condition, or agreement, at a time or upon an event not within some such period, shall be absolute.

" 27. With reference to contracts between landlord and tenant, Propositions 8 and 26 shall not affect any rent reserved by a lease, nor any covenant contained in a lease, nor any right of distress or entry for securing the payment of any such rent, or the performance of any such covenant, unless it shall appear by the instrument that such rent or covenant was reserved, or inserted for the purpose of evading the law against perpetuities.

#### " COVENANTS.

" 1. THE Burthen of every Covenant hereafter entered into by a lessee (whatever may be its purpose) shall run with the land, so as to be binding on the assignee of the term, unless it shall be collected from the instrument containing the Covenant, that the contrary was the intention of the parties.

" 2. The benefit of every covenant hereafter to be entered into by a lessee (whatever may be its purpose) shall run with the reversion,

unless it shall be collected from the instrument containing such covenant, that the contrary was the intention of the parties.

" 3. The burthen of every covenant hereafter entered into by a lessor (whatever may be its purpose) which in the event of his death would be binding on his devisee shall<sup>1</sup> be binding on the grantee or assignee of the reversion; and all remedies for the breach thereof shall be maintainable against such person, in the same manner and to the same extent as the devisee would be bound, unless it shall be collected from the instrument containing such covenant, that the contrary was the intention of the parties.

" 4. As between the lessor and the person claiming the reversion from, through or under him, such last-mentioned person shall be deemed the party primarily liable to any proceeding for the breach of any covenant, unless it shall be collected from the instrument containing the covenant, that the contrary was the intention of the parties.

" 5. The benefit of every covenant hereafter to be entered into by a lessor, whatever may be its purpose, shall run with the land, unless it shall be collected from the instrument containing the covenant, that the contrary was the intention of the parties.

" 6. Where a term has been created out of an estate not being a fee-simple absolute, and the immediate reversion shall hereafter become merged, such merger shall not destroy any rent or covenant annexed to the merged estate; but such rent or covenant, and all remedies for securing the payment or performance thereof, shall be thereupon transferred to, and be afterwards maintained by the owner for the time being of the estate in which such merger shall have taken place.

" 7. A covenant or condition hereafter to be contained in a lease, restraining the lessee from assigning or underletting or doing any other specified act, without the license of the lessor, shall not be deemed to be wholly released or extinguished by reason of a license given for one assignment or underletting, or other act contrary to the covenant; nor shall any particular license operate further than according to the terms thereof.

" 8. Where assignees of any bankrupt or insolvent debtor, or any sheriff under process of execution, shall dispose of the whole residue of any term vested in any bankrupt or insolvent or defendant, such disposition shall not be deemed a breach of a covenant or condition contained in the lease against assigning. But after any such disposition, the covenant or condition shall continue binding.

9. " In cases in which the relation of lessee and reversioner does

<sup>1</sup> Under the statutes of 3 and 4 W. and M. c. 4, and 1 Wm. 4. c. 47.

not subsist between the parties to the covenant at the time it is entered into, where a covenant relating to any land, rent, easement, or other hereditament, shall be entered into with the owner of the same land, rent, easement, or other hereditament, the benefit of such covenant shall run with the same land, rent, easement, or other hereditament, so as to be enjoyed by every person taking either under the covenantee, or under any act of the covenantee, notwithstanding any want of privity of estate between such person and the covenantee, and whether the title of such person shall arise by way of transfer of seisin, or by way of use, or under the exercise of any power or otherwise ; and whether the covenantor had or had not any estate or interest in the land.

“ 10. A covenant entered into by the owner of land (the relation of lessee and reversioner not subsisting between the parties) shall not in any case operate at law as a covenant running with the land ; but this shall not hinder Courts of Equity from interfering for the specific performance of such covenants against any person entitled to the land, in respect of which such covenant is entered into, and taking under the covenant or under any act of the covenantor, or taking an interest which it shall have been in the power of the covenantor to charge, (notwithstanding any want of privity of estate between such person and the covenantor.)

“ 11. Every person having an estate or interest in land to which any deed or instrument in the custody of another person may relate, but whose estate, interest or title is not inconsistent with any estate, interest or title claimed by the person having such custody, shall be entitled to have such deed or instrument produced, at his own expense, to himself or to his agent, at all reasonable times and places, and upon all reasonable occasions, and shall be entitled to maintain a suit in equity for that purpose, and also to have such summary remedy as hereinafter mentioned, in the cases hereinafter provided for.

“ 12. It shall be lawful for any person claiming an estate or interest in any land to which a deed or instrument in the custody of another person may relate, but not inconsistent with any estate, interest or title claimed by the party having such custody, to apply to a Judge of one of His Majesty's Courts of Record at Westminster for an order to compel the person having custody of such deed or instrument to produce the same ; and upon any such application being made, it shall be lawful for such Judge to issue a summons, calling upon the party having the custody of the deed or instrument, to show cause at such time as such Judge shall appoint, why the deed or instrument ought not to be produced ; and at such time

as such Judge shall so appoint, if the party summoned shall not attend, or attending, shall not show satisfactory cause, it shall be lawful for such Judge, upon being satisfied by the affidavit of the party applying, or otherwise, that the same party has an estate, interest or title in or to such land, and that the same is not inconsistent with any estate, interest or title of the party having the custody of such deed or instrument, to make an order that the said deed or instrument shall be produced to the applying party, or his agent, at such times and places as to such Judge shall seem meet.

“ 13. That upon the production of any deed or instrument, pursuant to any such order as aforesaid, it shall be lawful for the party requiring such production, at his own expense, to take any copy or extract of or from such deed or instrument.

“ 14. That an action on the case shall lie, at the suit of any person having an interest in or under any deed or instrument against any person having the custody of the same, for any injury which he may sustain, from its being lost or destroyed under circumstances of fraud or wilful neglect.”

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#### ART. II.—ARREST.

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*Copy of the Fourth Report made to His Majesty by the Commissioners appointed to inquire into the Practice and Proceedings of the Superior Courts of Common Law. (Presented pursuant to an address, dated 2d March, 1832. Ordered by the House of Commons to be printed 6th March, 1832).*

THIS Report may be considered as exclusively devoted to Arrest; for though several other incidental subjects are discussed in it, they are kept in strict subordination to their principal throughout. It's bulk is truly startling, being about 1300 folio pages, contained in two volumes, in the whole. The contents are thus distributed:—A Report, signed by four of the five present Commissioners, (Messrs. Pollock, Starkie, Evans, and Wightman) 40 pages; a Supplementary Paper, signed by the remaining Commissioner (Mr. Serjeant Stephen), 40 pages; Answers addressed to Consuls and Ambassadors, and other persons resident in Europe and America, 48 pages; Answers by Bankers, Merchants, Traders, &c., 275 pages;

Answers by Members of the legal profession, 126 pages ; Oral Examinations of various descriptions of persons, 180 pages ; Returns of various sorts. The Answers by persons resident abroad are 20 in number ; by traders, reckoning firms as single persons, 322 ; by lawyers, 79 ; The Examinations, 38.

It is evidently impossible to deal with such a mass of matter in the way in which we are wont to deal with Reports. We cannot undertake to select all that is important or interesting in the Appendix, and we have only to intreat the many intelligent and distinguished contributors, to whom we may make no allusion, to believe that we are yielding to imperative necessity when we appear to treat them with unmerited neglect. We fear we can do little more than analyse the Commissioners' reasonings, and state the present condition of the controversy ; and fortunately we have already done something towards clearing up the confusion in which this, like all other important questions, was originally involved. In the second volume of this work, we fully abstracted all the main arguments that had then been urged on either side, and gave our own opinion in favour of a modified continuation of the law. It is now our duty to see what new lights the abolitionists have thrown upon it ; and we will endeavour to discharge that duty impartially. But this is by no means so simple a matter as may be thought ; for, independently of a natural leaning in favour of the single commissioner, whose views very nearly resemble our own, it is impossible not to be struck by his superior command of the pen. Almost all his arguments are perspicuously expressed, and support each other in logical array ; whilst the joint production is loosely put together at best, and contains a great deal of bad logic and tautology.<sup>1</sup> At the same time, it is a very able and instructive paper, and places the evils of the present system in many striking and some original points of view ; whilst the names attached to it, considered as authorities, are undoubtedly very hard to fight against. We begin with the beginning :

“ We, your Majesty's Commissioners, appointed by your Majesty's Commission, bearing date the 10th day of March,

<sup>1</sup> We were wrong in attributing it to Mr. Evans. On the principle mentioned in our review of the first Common Law Report (vol. ii. p. 176), it is impossible to read half a dozen pages without seeing that more than one pen has been at work.



in the First Year of Your Majesty's Reign, whose hands and seals are hereunto set, do humbly certify to Your Majesty,

" That We have proceeded fully to inquire into and consider the subject of Arrest and Imprisonment for Debt in Civil Suits between Subject and Subject, and the effect thereof, and now humbly Report the Result of Our Labours to Your Majesty.

" We beg leave, however, to remark, that this subject for consideration is one of great difficulty, involving considerations not merely of Legal but of Public Policy.

" We are aware that conflicting opinions upon the subject are entertained by persons who are entitled to respect, and we regret that the opinions of Your Majesty's Commissioners are not unanimous upon the subject of the practical effects of the present system of ARREST and IMPRISONMENT for DEBT, and of the alterations which it may be expedient to make in it.

" We propose to submit to YOUR MAJESTY,

" 1.—A general view of the Law of England on the subject of Arrest and Imprisonment for Debt, as well on Mesne as on Final Process, and of the principal changes which the Law has undergone;

" 2.—The practical effects of the present system of Arrest on Mesne Process, and its comparative advantages and disadvantages;

" 3.—The alterations which, in our judgment, it may be adviseable to make in the Law upon the subject;

" 4.—Similar inquiries and suggestions on the subject of Arrest and Imprisonment on Final Process."

Having formerly given a history of the law of arrest, it does not seem necessary to copy that of the Commissioners, which corresponds exactly, except in being a little more concise, with our own.<sup>1</sup> They bring it down, as we did, to the 7th and 8th Geo. 4, c. 71, by which the lowest amount for which a man may be arrested was fixed at 20*l*. The Law of Arrest and Imprisonment upon Final Process is more complex and less generally known, and as it forms an essential part of the argument, we shall copy it:—

<sup>1</sup> 2 L. M. p. 323.

“ We now proceed to consider the Law of Arrest and Imprisonment upon Final Process.

“ The process of execution against the goods was and still remains very imperfect; nothing can be taken under it but goods and chattels properly so called, which do not include bank notes, bills, book debts, money in the funds, annuities, pensions, or sums secured by contract or agreement, and unless the person of the debtor could be detained until the debt was satisfied, the judgment would frequently be fruitless, though the debtor might be possessed of ample property, which could not be reached by any process.

“ At common law a *Capias ad satisfaciendum* lay in cases of trespass *vi et armis*, where the *Capias ad respondendum* lay before judgment. But the several statutes before mentioned having given the process of *Capias ad respondendum* before judgment in other personal actions, the *Capias ad satisfaciendum* has become a process of execution in them also; according to the rule that where a *capias* lies before judgment, it will also lie for the purpose of execution after judgment. By a particular statute the judgment creditor has a right to take half the profits of the debtor's land by virtue of an *Elegit*.

“ If the judgment creditor elects to take the person of the defendant in execution, the judgment is considered satisfied, and he cannot afterwards resort to any other execution against either land or goods unless the debtor die in prison. On the other hand, the defendant being taken in execution must, before the passing of the Bankrupt and Insolvent Acts, have remained in gaol for life, unless he paid the amount of the judgment debt, or otherwise satisfied the plaintiff.”

They here state the general effect of the Insolvent Act, 7th Geo. 4, c. 57, under which all persons in prison for debt, whether upon mesne or final process, may obtain their discharge by petition to the Insolvent Court, upon making a conveyance of all their property for the benefit of their creditors, and entering into a recognizance making their future effects liable to their debts and subject to a discretionary power in the Court to remand them for a limited time for fraud or misconduct.

"None but actual prisoners are entitled to the benefit of the Act, and however willing a debtor may be to surrender all his property to his creditors, he must undergo an imprisonment of about eight weeks before he can obtain his discharge.

"Exclusive of the general Act, there have been other statutes passed of limited operation for the discharge of prisoners in execution.

"By the 48th of King Geo. III. c. 123, any person who has been a year in prison upon a judgment for debt or damage not exceeding 20*l.*, exclusive of costs, may be discharged from imprisonment by application to any of the Courts at Westminster.

"And by the 32d of King Geo. II. c. 28, (commonly called the Lords' Act) extended by some subsequent statutes, prisoners in execution for sums not exceeding 300*l.* might have been discharged by the Court out of which the process issued, upon giving up their estate and effects in satisfaction of their debts, unless the creditors at whose suit they were in execution insisted upon their being detained and agreed to pay them 3*s.* 6*d.* a week; but by the 11th of King Geo. IV. and 1st of King Will. IV. c. 38, s. 10, no person shall be discharged during the continuance of the latter Act upon his own petition under the Lords' Act.

"The Lords' Act also by the 16th section, reciting, "That it sometimes happens, that persons who are prisoners in execution in gaol for debt or damages, will rather spend their substance in prison than discover and deliver up the same towards satisfying their creditors their just debts, or so much thereof as such substance will extend to pay," enables the execution creditor to compel the debtor to appear before the Court and give in a schedule of his property, and assign it for the benefit of his creditors, upon doing which he is to be discharged; but upon refusal he is liable to transportation for seven years.

"This Act, however is confined to cases where the debts or damages for which the prisoner is charged in execution do not exceed 300*l.*, and it is remarkable that this is the only provision made by the law of England for obliging a debtor to discover and give up his property, except in cases which

come within the scope of the bankrupt laws, the consideration of which does not come within the intent of our present inquiry."

This statement will be subsequently referred to, but as it requires no immediate comment, we proceed:

"We now proceed to report to your Majesty the result of our inquiries as to the practical effects of the existing Law of Arrest and Imprisonment, and the comparative advantages and disadvantages of the present system.

"It will be seen from the Evidence stated in the Appendix, that the advantages which a creditor proposes to obtain, in proceeding by bailable, rather than serviceable process, are,

"The compelling the debtor to make speedy payment, or come to an arrangement with his creditors;

"The procuring the security of bail, or,

"The trying the credit of the debtor, and saving the expense and trouble of further pursuit, where it would probably turn out to be fruitless.

"A debtor who has the means of payment has also the means of procuring bail. Bail, as is well known, may always be procured at a premium proportioned to the risk.

"The arrest in such a case, merely compels the debtor to elect between payment and putting in bail; the advantage therefore to the creditor, is at most the excess of the probability that the debtor will pay the debt, beyond that of his putting in bail or going to gaol, absconding or concealing himself; and as it appears from the returns that bail is more frequent than payment, it follows that in a majority of cases, the proceeding by arrest tends to increase expense and create delay."

The assertion in the last paragraph but one, that a debtor who has the means of payment has also the means of procuring bail, we take the liberty to doubt. The legislature certainly acted on a contrary presumption, when the 43d Geo. 3, c. 46, authorising a deposit in lieu of bail, was passed.<sup>1</sup>

<sup>1</sup> "It sometimes happens, that persons arrested upon mesne process may not be able to find sufficient sureties for their appearance at the return of the writ, and yet may be able to make a deposit of the money for which they are so arrested, together with a competent sum for costs, and therefore by the statute 43 Geo. 3, c. 46, reciting, &c. it was enacted," &c. (Tidd's Pr. 8th edit. p. 225.)

From the last paragraph we totally dissent, so far as a man can be said totally to dissent from any thing which he does not totally comprehend nor is able to find any one who does. For instance, the words "beyond that of his putting in bail, or going to gaol, absconding or concealing himself," imply that it is precisely the same thing to the creditor whether the debtor puts in bail or goes to gaol, absconds, or conceals himself, *quod est absurdum*. To our simple comprehensions it seems much more accurate to say, that the advantage to the creditor is the excess of the probability that the debtor will pay the debt or put in good bail, beyond that of his going to gaol, absconding, or concealing himself; for if the debtor puts in bail, the creditor clearly gains one of the objects he sought; and it is far from true, as assumed in the Report, that the proceeding in that case would be nugatory. In fact, every single sentence in this paragraph is wrong; for it is not even true that the arrest in the given case merely compels the debtor to elect between payment and putting in bail, unless it be also true that a man who *can* pay always *will* pay, and that there is no fear of a solvent party's absconding or fraudulently concealing his property. In the immediately succeeding paragraph, a great deal of the same looseness is observable. The effect of putting in bail is palpably mistaken throughout:

"The election of an arrested debtor to pay the debt rather than procure bail, must depend, in the first place, on the honesty of his intentions; if he meditate fraud, he will either go to gaol and take the benefit of the Insolvent Act, *or put in bail, which will enable him to execute his purpose more effectually than if the creditor had proceeded by mere serviceable process.*

"If, on the other hand, the debtor contemplates the ultimate payment of his debts, his determination to pay, come to a present arrangement with his creditors, or put in bail, must depend on the mere question of pecuniary interest, that is, whether considering the difficulty of raising funds, or the advantage of retaining those which he has, be worth the price to be paid for delay by putting in bail; where he contemplated ultimate payment, and the debt was small when compared with the difficulty and expense of bail, his interest would in-

duce him to pay or settle at once, rather than pay the price of delay.

“Where the debt was large, compared with the difficulty and expense of bail, the same motive would frequently induce him to put in bail rather than pay or arrange.

“This view of the matter derives confirmation from an inspection of the official Returns, from which it appears that the proportion of those who pay or arrange to those who give bail, increases nearly with the amount of the debt.”

“If these observations be correct, it is the fear of expense and exposure which induces a debtor to pay rather than resist, in the case of bailable process; but in the case of serviceable process the same motive operates. It is the interest of the debtor to pay or settle the debt, rather than incur an accumulation of expense by resistance; the only material difference seems to be, that in the case of bailable process the defendant is more immediately subjected to expense and exposure, than in the case of serviceable process. On the other hand, an arrest tends to irritate the debtor and to provoke him to resistance by giving bail, and to take revenge by going to prison, and placing his property beyond the reach of his creditor.”

The last paragraph is incorrect considered with reference to the actual state of the case, and inconsistent considered by itself. It is the fear of expense, exposure, *and imprisonment*, which really induces the debtor to pay; but, according to their own showing, the fear of expense and exposure operates in the one case, the fear of expense only in the other; in other words, the same motive operates, “the only material difference seems to be” that the same motive does not operate. A forcible statement of the common objection, that arrest leads to a waste of the debtor’s property and prevents the exertion of his industry, succeeds; and we are assured that the statements made by prisoners present many instances of debtors arrested for small sums who complain, in strong terms, that they have been prevented by imprisonment from discharging their debts by their industry, even after they had offered their creditors to pay them by instalments; statements which the Commissioners are welcome to believe if they like. Then comes the following:

“ It is only where the debtor is not wholly solvent, that arrest is productive of advantage; *where he is wholly insolvent, an arrest is useless.* Where he is perfectly solvent and not likely to abscond, an arrest is not only useless but oppressive. Where the debtor is in an intermediate state, possessed of property but not wholly solvent, an active creditor, by superior diligence, sometimes obtains a preference; this, however, is uncertain; the arrest, instead of producing payment, may irritate the debtor and occasion resistance, and is frequently attended with the risk that the debtor will go to gaol and take the benefit of the Insolvent Act; and even where the arresting creditor succeeds, he usually obtains the advantage at the expense of the rest of the creditors.”

We merely wish to protest in passing against the proposition marked in italics. It will appear, in its proper place, that one great argument for arrest is its indirect or preventive operation as a punishment in cases which no direct punishment can reach. In this point of view, it no more follows that an arrest is useless because the creditor gains nothing by it, than that criminal prosecutions are impolitic, because they generally aggravate the loss sustained by the prosecutor.

“ Looking to the Evidence and official Returns, (continue the Commissioners,) it will be remarked that the class of professional persons who are chiefly conversant in the business of arrest, differ considerably as to the superior efficacy of that process, and although a majority, in point of number, consider it as useful to creditors, others are of opinion that serviceable process is more effectual. It has been the practice of some to issue bailable process in all cases where the law allowed it; of others, so to proceed in all cases where they had not received instructions to the contrary; of others, in all cases where they knew nothing of the debtor; others have proceeded by serviceable process, in all cases where no apprehension was entertained that the debtor was about to abscond, or conceal his property; others, again, have exercised a discretion founded on the particular circumstances, the nature of the claim, the respectability and apparent responsibility of the supposed debtor, and have scrupled to proceed by arrest without some apparent necessity; others again have

forborne until milder methods had failed; according to some, the proceeding by serviceable process is considered more advantageous to the client, and the proceeding by arrest injurious, as likely to irritate and exasperate the party arrested, and to drive him to take refuge in the Insolvent Court, to the loss of the client; whilst some deem the present practice to be incapable of improvement, others consider it to be greatly defective."

We can vouch, from our own personal examination of the documents, that this statement is correct, though we do not quite agree in the following remarks :

"The varieties thus exhibited in the modes of practice adopted by professional persons, and in the conclusions which they have drawn, may be in a great measure attributed to the difference of circumstances under which they acted, and the classes of clients by whom they were retained."

It appears to us, that these modes of practice are mostly attributable to the individual characters and differing judgments of practitioners. We draw the inference from finding that discrepancies exist amongst practitioners of the same town or county to an equally extensive degree.

By way of illustration we subjoin the answers of the Cornwall solicitors, which chance to be the first that we hit upon :

"*Messrs. Coodé and Son* : In nine cases out of ten, where the plaintiff's demand is clear, we proceed by bailable process. *Mr. John Edwards* : I usually proceed by serviceable process, in the proportion of about seven to one. *Messrs. Paynter, and Whitford, and Mr. T. Collins* : In actions for the recovery of debts we usually proceed by serviceable process; generally speaking, the proportion is two to one. *Messrs. Pender, Rimell, and Genn* : Where the debtor may be held to bail, we usually proceed by bailable process; say four times out of five."

A common notion is, that arrest is most frequently resorted to by what are called sharp practitioners for the sake of the additional costs, but we do not believe this opinion to be just. The firm, amongst the above, which most frequently resorts to arrest, is one of the highest respectability and far above any suspicion of the sort.

The Commissioners next proceed to sum up and classify the



opinions of the mercantile examiners. They state that no doubt whatever is entertained of the beneficial effects of arrest, in order to prevent a debtor from absconding; and they remark that numbers of those who think the power useful, state expressly, as the ground of that opinion, that it is essential for the prevention of fraud.

“ Others are of opinion that the power is advantageous, because it compels debtors speedily to pay or arrange with their creditors, or operates as a test for ascertaining the means and circumstances of the debtor; upon this question a considerable difference of opinion is observable.

“ Those who deem the practice to be advantageous for such purposes, consist for the most part of traders whose particular credits are not large, though their general dealings are frequently extensive, and many of these, it is observable, state the power of arrest to be beneficial, alleging that if it were to be taken away, they should lose their only security over the debtor.

“ It is natural that such as rely much on the security which the power of arrest gives them should desire its continuance. But it appears to us that many of this class erroneously suppose that the law can, by allowing them to exercise a severe compulsory power over the person of the debtor, supply the want of proper caution and inquiry on the part of the creditor.”

It appears to us that the traders alluded to, suppose nothing of the sort. They suppose merely that the power checks the employment of means for procuring credit which no ordinary caution or inquiry can reach; and it is to be observed that this class of frauds is peculiarly directed against tradesmen whose particular credits are small.

“ It is to be remarked (continue the Commissioners) that the same class of persons complain of the operation of the Insolvent Law as highly injurious; yet it is obvious that, whilst the power of arrest is regarded as affording security to a creditor, credit will be given with a facility sure to be abused by the dishonest and needy; the consequence of which is, that a Court of Discharge is rendered absolutely necessary, to prevent the evil, of gaols crowded to excess with indigent

prisoners, without benefit to the creditor, and to the nuisance of the public.

“ From the unrestrained power of arrest, facility of credit, crowded gaols, and a Court of Discharge, are successive and necessary consequences.”

According to our own estimate, an immense majority of the contributors to the Appendix, complain of the operation of the Insolvent Laws, and of the easy escape they afford to the cheat; and a great many think that if the burthen of proving himself an innocent unfortunate were imposed upon the debtor, and immediate discharge formed the exception not the rule, the Insolvent Court would be soon released from a large proportion of its business; that, in short, much fewer would expose themselves to the risk of being sent to gaol, if it was not so easy to get out. Many of the same class of traders, it is said, think that the proceeding by arrest on mesne process might be safely dispensed with, if more efficacious means were provided for getting at the property of the debtor; and “ on the other hand, according to the opinions of many, as well professional persons, as traders, an arrest, *except for the prevention of fraud*, is disadvantageous.” These, however, to the best of our belief, form a small proportion of the whole, and the exception just mentioned has a much wider significance than the Commissioners seem willing to allow to it.

The following statement as to the official returns is highly important.

“ We now beg leave to advert to the official Returns :

“ It appears from the official Returns, that out of 431,396 writs issued from the Superior Courts in five successive years, 174,495 only were bailable, leaving 256,901 for serviceable. The latter include cases where bailable process could not have been issued, either because the nature of the claim or the smallness of the debt, or the privilege of the defendant, excluded a proceeding by bailable process; but after making due allowance for those exceptions, we believe that the number of serviceable, for sums in respect of which bailable process might have issued, exceeds the number of bailable writs in a very considerable proportion.

“ The official Returns afford the following results :

" 1st. That on an average taken from 265,901 actions commenced by serviceable process, nearly one half are settled on service without any appearance entered; and it is probable, though the number cannot be precisely ascertained, that the plaintiff obtains payment, or a settlement, or judgement by default, in at least two-thirds of the whole number of actions so commenced, without resistance by the debtor to the extent of putting in a plea.

" 2d. That on an average taken from 26,650 actions commenced by bailable process, not one in six of those against whom such process is issued pays or settles in the first instance, but either cannot be taken, or is taken to gaol, or gives bail to the sheriff; and that in more than three-fourths of the whole number of actions so commenced, the party against whom the process is issued is either not taken, or being arrested goes to gaol, or puts in special bail.

" It follows, that, upon the average, both delay and expense are much increased by resorting to bailable process."

Now, in the first place, we beg leave to observe that this statement is directly at variance with a statement put forth in the first Common Law Report (p. 71), where the following paragraph occurs:—

" Yet we may be permitted to remark, that, whenever a proposition for discontinuing or imposing farther limitation on the practice in question shall be entertained, it will be material to recollect that the operation of a writ by way of arrest is not merely to prevent the escape of the debtor, but in a vast number of cases (and more particularly where the debt is small) to enforce, by the mere apprehension of imprisonment, immediate payment or compromise; and that, if writs authorising arrest were abolished, or applied only to large demands, the temptation to defend actions for the mere purposes of delay would be much increased. In illustration of this, we have set forth in the Appendix an account of the number of such writs issued from the superior courts at Westminster, and of persons committed to prison thereon, and also of bail put in to the action, in five successive years, by which it will appear that the total of writs was 162,263, and the number of imprisonments upon them and the bail put in 58,021. From the number of writs, indeed, must be deducted such as may have remained unexecuted, in consequence of the defendant not being found. We apprehend,

however, that after making this and all other allowances, the result will still be, *that a very large majority of those against whom process of arrest is taken out are driven by it to immediate payment or terms of compromise, and either avoid any commitment to actual custody, or obtain a speedy discharge.*"

The average of five years is certainly more to be depended on than the average of one. The four Commissioners therefore must be content to draw an opposite conclusion to that above expressed by them. They must also have the goodness to make some allowance for the very inferior amount of the suits commenced by serviceable process, which makes them much more likely to be arranged; and some allowance for the sort of cases in whichailable process is resorted to, it being well known that many persons never make use of it except under an apprehension of their debtor's insolvency.<sup>1</sup>

"Another very important inference (they continue) to be drawn from these results is, that a test is afforded for judging of the comparative accuracy of conflicting statements on matters which cannot be decided by reference to the official Returns. Many, who are of opinion that it is much more advantageous in general to proceed by arrest than by serviceable process, state, that it is much more frequent to proceed by arrest, and that the latter proceeding is more efficacious than serviceable in procuring payment; on the other hand, many professional persons and traders are of opinion, that serviceable process is more frequent and more advantageous to the creditor. The results from tables prove that the judgment of the former, in supposingailable process to be either more frequently resorted to or generally more efficacious thanailable, is incorrect; and we may observe, that inconsistent as this result is with the opinion of many traders, who suppose that the proceeding by arrest is advantageous, and who even act upon that supposition to their own loss, it is in accordance with plain and obvious principles, that a man who owes a debt must be more able *and willing* (q<sup>y</sup>) to pay it when merely served with process,

<sup>1</sup> Mr. Serjt. Stephen (Fourth Rep. p. 73,) makes these objections, but does not appear to be aware of the variance between the Reports. He also objects, that the preventive effect of arrest is not allowed for.

and where he is left at liberty to use his labour and exertions for the purpose, than he would be when he was shut up in prison, and obliged to pay expensively to regain his liberty, and was irritated by the imprisonment, cost and expense."

What is here called another inference, appears to us to be the same, a little amplified, which the last sentence of our last quotation from them involved. Neither do we precisely understand how results from official Returns can afford a test for judging on matters which cannot be decided by reference to the official Returns themselves; unless indeed the results in question are avowedly different from what other people would draw, which it is our firm conviction they are. As the whole paragraph proceeds upon what we have already stated to be gratuitous assumptions, it seems unnecessary to examine it in detail. For the same reason, we shall merely quote the observations that succeed, in which the same assertion is confidently asserted, and one of the weakest objections to these alleged results is answered as if it were the only one.

"It is urged, however, that the results from the Returns are not decisive on the question, because an arrest will, in some doubtful or desperate cases, produce payment, where serviceable process would not. We believe this to be true; but we cannot but remark, that when the Returns clearly prove, that, in general, serviceable is greatly more efficacious thanailable process, the advantage supposed to be derived from the latter (excepting always cases of fraud) must be limited, and confined to the mere chance afforded to the creditor of obtaining payment in a desperate case, where an arrest is a mere experiment which may succeed, but which frequently produces only expense and disappointment."

They then cite, in proof of the efficacy of arrest, the instances in which payment is procured by fixing the sheriff or the bail, or where, by arresting a man as he is about to embark for a distant voyage, he is compelled to pay a larger sum than is due; quite forgetting, with regard to the last, their former axiom, that a debtor who has the means of payment has also the means of giving bail. They also admit that payment may now and then be obtained from the friends of the debtor

by arresting him, where serviceable process would be ineffectual ; but they do not seem to think that the power of occasionally levying the debt on the sheriff, the bail, or the debtor's friends, a beneficial one.

“ Another advantage stated to result from the practice of arrest on mesne process, is the compelling a debtor to make a fair distribution of his effects among his creditors. In our opinion, the practice so far from facilitating this object, is prejudicial to creditors, in preventing such a distribution.

“ The consideration of this question, renders it necessary to premise a few remarks on the nature and policy of the provisions made by the law of England for the satisfaction of creditors.

“ These consist either in special provisions made by the bankrupt laws, or in the ordinary proceeding by action.”

These are briefly distinguished: the object being to show that the ordinary proceeding by action, however commenced, is a bad mode of enforcing distribution ; that

“ The power of each creditor to proceed in a separate action and to arrest the body of the debtor, is not only inadequate to the effecting a fair administration of an insolvent's property, but on the contrary, tends to prevent a voluntary cession on the part of the debtor. In such cases the interests of the creditors are opposite and conflicting: each by superior activity strives to gain an advantage to himself; the natural consequence is, that the debtor is distressed, harassed and irritated by successive arrests; his estate is wasted by law expenses, and is seldom made available to the creditors; and even where such arrests are successful, the benefit is not to the body of creditors, but to one or a few, who, by sudden and unexpected arrests, have been able to secure preferences to themselves.”

It is also argued, that the power of arrest by which each creditor expects to recover the payment of his own debt, tends to prevent creditors from accepting compositions; and the following well-grounded complaint against the present state of the law is adduced.

“ A debtor, who, finding himself in difficulty or even in-

solvency, but so circumstanced as not to be within the scope of the bankrupt law, is at present frequently placed in a distressing situation; however willing he may be to do substantial justice, by making a cession of his property for the benefit of his creditors, he is often unable to effect his purpose. If he offer a composition, it is in the power of one or two creditors, out of mere caprice or in the expectation of being paid in full, to defeat the arrangement, and several cases of great hardship have occurred, where, after a debtor has surrendered the whole of his estate for the benefit of his creditors, he has been arrested and left to lie in prison without the means of obtaining his liberation by a judgment of the Insolvent Court. If the debtor, as is not unfrequently the case, procure an arrest in order to take the benefit of the Insolvent Act, he makes the cession at the expense of imprisonment in a public gaol, by which an indelible stigma is impressed on his character, his credit is ruined, and his means of livelihood usually cut off. Such a condition, we have no doubt, deters men of honest pride and proper feelings from making an early cession of their property, and therefore operates injuriously to the interests of creditors."

Now this may be a plausible reason for allowing the debtor to make a formal cession of his property without going through the form of an arrest, and even for assimilating the insolvency in some other respect to bankruptcy. But we cannot see how the following conclusion can be drawn from it.

"We do not feel ourselves at liberty to offer any opinion on the question, whether it may be politic to extend the present bankrupt law, or to make separate provision for an earlier seizure and effectual distribution of an insolvent's property on his committing some defined act of insolvency. But it is very material to observe, that, at present, the only efficacious mode of distributing the estate of an insolvent equally amongst his creditors, in cases which do not fall within the bankrupt law, is by a voluntary cession of his property, and therefore that *the present practice of arrest* operates unfavourably to creditors as well as debtors, in opposing very serious impediments to such arrangements, and that a very material benefit would be conferred on the commercial classes of your Ma-

jefty's subjects, by encouraging the voluntary cession of the property of traders and others in case of insolvency."

Here again, in our opinion, the four Commissioners are wrong. As the present law of cession is neither irremediable nor indissolubly connected with the present practice of arrest, it is unfair in the extreme to draw inferences from the bad state of the former against the last. But, at any rate, the present practice of arrest cannot have the effect above attributed to it; for if both creditors and debtors constantly lose by the sort of scramble described, one would suppose that the bare apprehension of such a result would, at an early stage of the debtor's decline, induce him to offer, and the creditors to accept of, a compromise. To suppose that mercantile men continue placing so great a reliance on arrest, when the remedy is constantly failing them, is to suppose them little better than fools.

"Another advantage stated to be derived from the practice of arrest consists in obtaining the security of bail when a debtor is likely to abscond." To this they not merely assent, but propose extending the power by enabling the creditor to obtain authority for the arrest without the delay occasioned by the necessity of suing out a writ in London. They do not enter into particulars, but we presume they have the Scotch practice in mind, where a *meditatio fugæ* warrant may be had on application to a magistrate.

"The power of arrest is also stated to be useful as a test to which the creditor may put the debtor, for the purpose of ascertaining whether he be of sufficient credit and ability to warrant the creditor in incurring further expense in prosecuting his suit; and the hardship is much insisted on, that the debtor may, at a very small expense, put the creditor to great cost and delay, which may after all turn out to be fruitless."

They answer this by saying that, if the experiment sometimes succeeds, it sometimes fails, and adds to the embarrassments of all parties; and they answer the incidental argument, that if a man be insolvent the sooner his insolvency is exposed the better; by the remark, that an honest man, labouring under a temporary pressure, may be entirely ruined by an arrest.



“ The opinions of traders prove that an arrest is oppressive, frequently ruinous, even to a solvent man, whose property is embarked in trade. Where, indeed, a trader is placed in such difficulty that he cannot meet his ordinary engagements in the course of business, it would be desirable that he should submit his affairs to his creditors, or that a cession of his property should be made for their benefit, and that inducements should be held out to the trader to make such cession of his property at an early period, to prevent its being wasted by progressive difficulties, or spent in law expenses, consequent on arrest, imprisonment, and proceedings in the Insolvent Court.

“ Desirable as such a result may be, we doubt whether any compulsory seizure and distribution of a debtor's estate can be justly and conveniently effected, previous to the obtaining an adjudication against him by competent authority. To permit the creditor to arrest the goods of an alleged debtor by way of security, without such authority would, in our opinion, occasion complicated legal difficulties, and greater inconvenience and distress than an arrest of the person. To allow it to be done in cases where the debtor had, by some particular act or omission, induced a suspicion of insolvency, would amount to an extension of the bankrupt laws, which we are not at present prepared to advise, though we think it well deserving of serious consideration.”

The simplicity of the following observation is admirable:—  
“ We think that the complaint that the debtor has the power of putting the creditor to delay and expense, has in reality very little to do with the law of arrest. If the complaint be well founded, the obvious remedy is to remove it by direct means, by providing speedier and cheaper modes of redress ;”—as if removing the expense and delay of lawsuits was the plainest and most natural operation in the world ; as if any system of procedure were conceivable in which the debtor would not have the power of putting his creditor to expense and delay by resisting.

“ Another argument urged in favour of the unlimited power of arrest on mesne process is, that the fear of arrest now operates to induce debtors to pay their debts, and that thus pay-

ment is obtained by the creditor without resorting to any process, and that mischief would result to creditors from removing this security."

To this it is very properly replied, that it is not consistent with any safe and just principle of jurisprudence to enforce immediate acquiescence in a mere civil claim by the terrors of imprisonment; and that, if the terrors of a gaol be sufficient to compel a reluctant or fraudulent debtor to pay his debts, they are also sufficient to force a person of honourable feeling and character to pay what is not due, in order to avoid the dishonour of a public arrest. But this objection might be obviated by a former proposition of our own: to enable any man who disputes a claim and apprehends an arrest, to prevent it by volunteering security.<sup>1</sup>

The Report proceeds:

"In the next place, we think, that if the apprehension of imprisonment had any material practical effect on credit it would be to prevent respectable persons from dealing on credit, which might lead to a disgraceful and ruinous imprisonment, dependent on events against which ordinary prudence could not provide, whilst on the other hand the apprehension of imprisonment would have no salutary effect on *the dishonest and fraudulent*. Persons of this description are not likely to be influenced by the dread of imprisonment; *they avoid it when they please by putting in bail*; they frequently challenge their creditors to arrest them, or even procure themselves to be imprisoned for the very purpose of accomplishing frauds."

It is astonishing that men mixing in the world should write down such opinions as these. Here, in the very same paragraph, it is coolly assumed that respectable persons cannot procure bail, and that the dishonest and fraudulent can; and, in the teeth of the most conclusive evidence that arrest is hardly ever resorted to except when the debtor has misconducted himself, we are told that its only material practical effect (if any) on credit, would be to confine respectable persons to ready-money dealings. There is not a trader in London who would not laugh the supposition to scorn. As to

<sup>1</sup> 2 L. M. 369.

the conclusion of the paragraph—to say generally that the dishonest and fraudulent do not apprehend imprisonment, is almost as absurd as an argument contained in a late number of the *Revue Encyclopédique*, proving, to the writer's entire satisfaction, that death was not a punishment but a reward, and that men took a pleasure in being hanged. If imprisonment be also a gratification, we shall soon have no punishment left.

The next objection stated to the lastmentioned argument is, that, if the apprehension of imprisonment be an inducement to the debtor to pay, it is an inducement to the creditor to trust; “and that it operates prejudicially may be inferred from the fact, that upon the average at least one half of the whole number of those against whom bailable process is issued, are either not taken or, if taken, go to gaol.” Here it seems to be assumed, that all a trader's bad debts are attributable to arrest; and the Commissioners are evidently not aware that many traders have no alternative between trusting and not trading at all.

“Again, we believe that the extent to which debts are incurred will always depend on the facility of obtaining credit, and that it will be restricted not by fear or apprehension on the part of those who can obtain, but by the caution and prudence of those who give credit, and that the greater the power of the creditor to harass and distress the debtor, the greater will his apparent security be, and the greater will also be his disposition to trust. The ordinary competition in trade is usually sufficient in itself to occasion credit to be given to a greater extent than is beneficial, and therefore to supply any additional and artificial stimulus is impolitic; but to hold out to the creditor a prospect of legal security for payment, which is usually delusive, is very injurious.

“It may also be observed, that it is not so often the fear of imprisonment as the fear of exposure of circumstances and the certainty of accumulated expenses, which induce a debtor to endeavour to settle with his creditor. Where these are not sufficient motives, the fear of imprisonment would not induce him to pay the debt, but merely to put in bail.

“Where the debtor had the means of paying the debt or

arranging with his creditors, but from fraudulent or perverse motives chose to resist, the fear of imprisonment would not prevent resistance, it would merely compel him to put in bail."

We stated in our former article on this subject, that, in our opinion, credit stood more in need of a restriction than a stimulus; but we stated, at the same time, that the debtor's fears are as much a restriction as the creditor's, and we shall in due time adduce a fact or two clearly showing that statement to be right. Two other arguments in favour of Arrest are also examined by the Commissioners: 1. "That if the power of arrest which the creditor now possesses were to be diminished, his losses would be more frequent, and that he would remunerate himself by an increase of charge on the solvent customer." We certainly have met with this argument in print, and seen the practice of tailors adduced in favour of it, but we should never dream of urging it ourselves. 2. "That were the power to be limited, the facility of obtaining credit would be injuriously diminished;" which, though called another argument, is clearly involved in their preceding observations. We quite agree with the Commissioners that this apprehension is a groundless one.

"We next," say they, "propose to advert to the evils which are incident to the present practice of arrest on mesne process." But here we must be excused from following them so minutely as we have hitherto done, for the greater part of what is now brought forward under the head of evils has been adduced already in the shape of objections to arguments in favour of arrest; and they henceforward become tautologous to a most wearisome extent. For instance, the evils resulting to the public from the Insolvent Laws, which are viewed as a consequence of arrest, are repeated four times, being once for each Commissioner,<sup>1</sup> at p. 19, and once again at p. 21.

To give another illustration of the faulty mode in which

<sup>1</sup> An eminent special pleader retired (we trust only temporarily) from the bar, on being told by Lord Tenterden, in banco, that he had used the same argument four times over, replied, "Yes, my Lord, but there are four of your lordships." The Commissioners perhaps will urge the same sort of apology.

their materials are arranged, we request the reader's attention to the mode in which the following argument is brought out :

" The result of our inquiries, leads us to represent that the effect of the Law of Arrest is, to induce traders to give false credit, (by which we mean credit given to such as are not trust-worthy in respect of character and property.)

" To induce creditors to pursue severe measures against debtors.

*" And that the effect of the Law of Arrest, in combination with the Insolvent Law, is to encourage frauds on creditors."*

To establish this proposition, they allege, for the second time, that the ordinary rivalry in trade is adequate to the production of credit, and then repeat the observation, made so very often already, that the power of arrest frequently induces the creditor to give false credit; adding, however, that the observation must be limited to debts of 60*l.* and downwards, beyond which it is not customary to trust without more careful inquiry. They then repeat, for about the eighth time, that one evil consequence of trusting to arrest is that the disappointed creditor hastens to arrest the debtor and that the alarm thus given operates as a signal to the other creditors to proceed by the same process, to the injury of the creditors as a body, and the almost certain ruin of the debtor. Finally they urge that the creditor frequently gives credit to a man of no substance, with the view of enabling him to assume a false appearance and induce others to trust him, and then by means of a sudden arrest secures satisfaction to himself from the funds of others. To this succeeds, in the form of a distinct paragraph, and apparently as part of the proof, the identical proposition they are endeavouring to prove : " That the effect of the Law of Arrest in combination with the Insolvent Law, is to encourage frauds on creditors ;"—and they then actually prove it over again by repeating the identical arguments we have just abstracted. It is observable that the composition of each paragraph is individually good, so that we can only account for the confused condition of the argument by supposing that the parts executed by each Commissioner were undertaken without sufficient concert, and, when completed, put together in haste. At any rate, the circumstance must be allowed to constitute an ample apology for

us, if, instead of abstracting their statement of grievances, we merely state so much of it as has not been stated before. Following this plan, we come first to the alleged evil of the Bail system, said to be one of great magnitude. The defendant, it is urged, is put to considerable expenses, and exposed to the extortions of the sheriff's officer, at least; and as it is irksome and annoying to respectable and solvent persons to expose themselves to cross-examination as to their means and circumstances in open court, the difficulty is very great of inducing persons of that description to become bail, and the defendant is driven to hire bail to the great multiplication of perjuries. We feel bound to give the conclusion of this argument:—

“ It appears to us that it is not consistent with reason, or with any principle of political convenience, that a defendant should be compelled to pay so large a price, as the condition (in effect) of resisting the plaintiff's claim; the consequences are exceedingly burthensome, as we have already observed, where the debt is small, and the money so paid is, as far as the parties are concerned, absolutely annihilated; whilst it is lost to the defendant, it is not gained by the plaintiff.

“ Were a scale to be made of the average expenses of putting in bail, and were it to be enacted that every debtor, on arrest, who did not pay or settle with his creditor, should either go to gaol or pay him the average price of liberty, as the condition of being allowed to defend, the law would probably be deemed to be harsh and unreasonable, but in effect the present law is more so; in the one case the amount paid is wholly lost to both parties, in the other it would be applied to the benefit of the one or the other, or of both.”

This is so ingenious an argument that we are tempted to carry the principle of it a little farther than the Commissioners. Were a scale to be made of the average expenses of defending suits, which in the case of demands not exceeding 10*l.*, would generally be found to exceed the sum recovered, over and above the taxed costs, and were it enacted that every person served with process in a suit under that amount, should immediately satisfy the demand, the law would probably be deemed harsh and unreasonable, but in effect it would be an indulgent one; for it would put the

debtor in no worse condition than if he gained the suit, and would prevent his incurring the risk of the great additional expense of losing it; whilst the plaintiff would receive his money without any deduction for costs. We could put other cases of the sort with facility, but we hold it a very commonplace description of sophistry to build dilemmas out of the apparent contradictions and inconsistencies which all complicated systems present.

“Such are the evils which directly result from the present system of Arrest. We have next to notice some other abuses, to the commission of which the practice affords a facility, which, in many instances, is productive of great injustice and suffering to individuals, without any adequate remedy.”

In the first place, it is urged, that Arrests are occasionally made for the purpose of malice, or oppression, or fraud, where no debt is due. “One flagrant instance of such abuse may be cited, where a mother was arrested by her son for the sum of 2,000*l.* for the purpose of frightening her into an unjust settlement; another instance of a similar nature occurred lately, where a son arrested his own father to a large amount, where nothing was due. In another instance, an uncertificated bankrupt arrested all his assignees, to the amount of 40,000*l.* In another case, a party was held to bail for the sum of 14,000*l.* by the mere trick of a prisoner confined in the Fleet for debt. Cases of great oppression have also frequently occurred, where foreigners have been held to bail to a large amount, or thrown into prison from inability to procure bail. Complaint has been made by the Consul of the United States of America, at the Port of Liverpool, that the masters of vessels are exposed to shameful impositions and extortions by arrest at that port, for pretended debts; and that the abuse had become quite intolerable to masters of vessels from that country.”

In the second place, it is not unusual to arrest for more than is due. After simply stating this abuse, and setting forth the statute 43 G. 3. c. 46., which gives defendants costs in such cases,<sup>1</sup> they press again the hardship of imposing imprison-

<sup>1</sup> The manner in which this statute has been in a great measure neutralised by the courts, was explained in our former article on this subject.

ment or bail, as the condition on which the defendant is allowed to defend the suit; of exposing him to the extortion of bailiffs, and the cost and trouble of procuring bail; adding, however, one fresh, though not original, remark, that they "cannot but consider the law as too favourable in this instance at least to the plaintiff, which, whilst it requires a defendant to deposit not only the amount of the debt claimed, but also a sum to cover the costs, does not require the plaintiff to give any security for the serious injury he may have done to the defendant by arresting him without sufficient ground."

The requiring every plaintiff who resorted to arrest to give actual pledges, was one of the many securities against abuse proposed three years ago by ourselves.

They then tell us again that they have reason to believe that arrests are by no means unfrequent where no debt is due, and that even where a debt is due, the process is often used oppressively; in proof of which, they adduce the varying practice of practitioners, some of whom arrest in all cases where they do not happen to possess any personal knowledge of the debtor's responsibility. The abuse is stated to be most frequent in respect of bills of exchange, which, it seems, are frequently bought up for the purpose of arresting the parties to them. "The buyers of such bills, for obvious reasons, usually employ their own confidential bailiffs, and bailiffs themselves are in some instances connected with money lenders, who supply relief to debtors in difficulties on terms which serve but, eventually, to plunge them deeper into distress."

Mixed up with re-statements of what has been stated some ten or a dozen times before, we find, in page 24, two short paragraphs which we think it necessary to quote.

"We may here observe, that after much consideration, we have thought it better not to insert in the Appendix the statements which we have, in answer to our questions, received from prisoners during their confinement in gaol. These contain numerous instances of great hardship and oppression; and although we have no reason to suppose that such statements are untrue, and many of them, as far as we can judge, from their plainness and simplicity, appear to be worthy of credit, yet as they involve serious imputations on the characters of



parties who have no opportunities of denying those statements, we have thought it better to omit them altogether."

It will be generally admitted that the Commissioners have exercised a wise discretion in this matter. After dwelling a little longer on the same topics, and estimating the loss to the parties concerned by the law of arrest at 300,000*l.* a year; they urge some singular objections against a plan proposed to them with the view of putting an end to extortion—that the defendant should not be arrested in the first instance, but merely served with a notice to put in bail or surrender within a time limited. To this they object, first, that it would act as a hint to the dishonest debtor to abscond, and, secondly, that the price to be paid for liberty by putting in bail would be reduced by the ordinary amount of expenses of bail to the sheriff, and of the spunging-house extortions; from which the following ill consequence is anticipated:

"But then, in the same proportion would the pressure on the defendant to put in bail rather than pay the debt, be diminished. If bail were in all cases easy and unexpensive, the arrest (always excepting cases of fraud) would be of no value to the creditor, and in proportion to its being more or less expensive, is its efficacy in compelling payment necessarily increased or diminished.

"The consequence, therefore, of relieving defendants from the bailiffs' extortion, would be to lessen the number of payments, and increase the number of bail upon arrests."

This objection is founded on a complete misapprehension of the argument. The object of arrest is payment or security that the defendant shall be forthcoming to submit to the judgment of the court. To say that the power of arrest is ineffective or valueless without extortion, is something like saying that the punishment of hanging is ineffective without drawing and quartering,—only rather more absurd.

Under the guise of inquiring to what extent the present practice of arrest is warranted in principle, and consistent with the spirit of the law of England, the Commissioners introduce again their main objections to it, some more than once, and then point out the inefficiency of the present checks on abuse; namely, the requiring a previous oath, the remedy

by action for a malicious arrest, and the statute before mentioned giving costs for an excessive arrest. Having formerly dwelt at considerable length on the inefficiency of these, we do not think it necessary to copy the observations in the Report substantially agreeing with our own. They also quote Paley's authority in proof of the inhumanity and impolicy of pursuing with "the extremity of legal rigour" a person who has become insolvent by no fault of his own (which most people will probably admit without any authority at all); forgetting that the general tenor of Paley's opinions is decidedly in favour of arrest. Stating that "these are the obvious and primary objections in point of principle," but begging leave "to advert to the principle which has been relied on in support of the practice"—they go over a portion of the same ground again; declaim a little about the undeniable nature of the right to life and liberty which the law of England confers, and give another sketch of the history of arrest, concluding with the following supposition. "It is probable that when the sum of 20*l*. was first adopted as the minimum in respect of which a debtor was compellable to find special bail, it was at least equal to 80*l*. in present money." This sum, as every one knows, was finally fixed only five or six years ago as the minimum; and we really do not understand why the first fixation should enjoy more weight as a precedent than the last.

"We do not deem it necessary (they add) for the purposes of this Report to enter into any detail of the practice of arrest in foreign countries, as we conceive that it would be impossible, without being more intimately acquainted with their several systems of civil procedure than we profess to be, to judge how far institutions peculiar to those countries might safely be adopted in England. We cannot, however, but observe, that the laws of other European nations, in the case of civil debts, appear to be more favourable than the law of England to the liberty of the subject, but are yet found to be adequate to the purposes of justice. We may further observe, that in America, where the process against debtors was in a great measure the same with the law of England, changes have been already made, by which the power of arrest has been modified, and that it is probable that these will be extended."

The conclusion is, "that, *in principle*, the power of arrest ought to be confined to cases of actual or meditated fraud"—which is saying little unless it can be so confined in practice without leaving a loop-hole for dishonesty—and that "the mischief and inconvenience of which creditors chiefly complain, and against which the power of arrest is no effectual remedy, may be greatly alleviated if not wholly removed—

"By providing cheaper and speedier means for the recovery of such debts as are usually the foundation of arrests :

"By providing that interest shall be recoverable on all debts from the commencement of the action down to the time of execution :

"By enabling creditors to recover the full amount of the costs reasonably incurred in prosecuting suits :

"By affording to creditors a more summary remedy on written, and particularly mercantile securities :

"By holding out inducements to debtors to make a cession of their property at an early stage of their difficulties, for the benefit of creditors.

"We believe that temptations to fraud and to delay will be greatly diminished by making all kinds of property which are subject to the claims of creditors under the Bankrupt and Insolvent Laws liable to the execution of the judgment creditor ;

"And by the infliction of certain and severe penalties on such debtors as abscond or remove, conceal or alienate property in fraud of their creditors after the commencement of the suit.

"Such provisions being made for the security of the creditor, we recommend that no one shall be arrested for debt, unless the plaintiff, or some one on his behalf, shall make oath that a debt to the amount of 20*l.* is due, and that he believes the defendant is about to abscond.

"Or unless a judge of one of the superior courts shall make a special order of arrest.

"That the party may be arrested either as the first step in the cause, or in any subsequent stage of the cause.

"But that in all cases of arrest it shall be competent to the party arrested to apply to the Court or to a judge for relief."

Remarks, explanatory of these propositions, succeed. Some of these appear to us to be blameably vague. For instance :

"The average length of time which intervenes between the

issuing and return of a writ in one of the Superior Courts at Westminster is not less than two months; we see no reason why the return should not be so expedited as to enable a plaintiff to obtain judgment in a shorter time. The process in such cases would consist merely in the service of a summons; the proceedings in such actions are usually simple, indeed merely formal; the bill of particulars, the preparation of which requires no technical skill, contains in general the best and most satisfactory notice to the defendant of the real nature of the claim.

“ We conceive that we should be deviating from the subject of immediate inquiry, in giving any opinion on the most advisable means of promoting this object; but we may venture to assert, that the sums now uselessly expended in the arresting and liberating of debtors, far exceeds the expense of any establishments which might be necessary, either for the providing unexpensive and speedy means for the decision of small claims for debt, or for the providing proper tribunals for the administration of a wholesome and efficient system of insolvent laws.”

No allusion is made to Lord Tenterden's Acts, by which judgments have been very greatly accelerated; and we are therefore left in doubt whether the Commissioners are speaking with reference to the system as it stood before these Acts were passed, or as it stands now. Neither is it quite clear whether the evil of delay is to be remedied by the expediting of judgments in the superior courts, or by the creation of inferior courts. But we happen to know that there is a strong suspicion abroad that one main ground of Lord Brougham's eagerness in promoting the abolition of arrest, is the desire of forwarding his Local Court scheme by removing one of the most effectual means by which the speedy settlement of debts, from 20% to 100%, is compelled.

The proposed summary remedy on written securities is thus explained:

“ We propose that in all cases where the debt is claimed by virtue of a bond, bill of exchange or promissory note, executed, drawn, accepted, or made by the defendant, the plaintiff, after having filed an affidavit of the sum due to him on such security, and also an affidavit of execution, shall, on

the service of process on the defendant, be entitled to give notice that judgment will be signed, unless within a specified number of days next after the service of such notice the defendant shall either give security, to be approved of by the master or some other officer of the Court, for the payment of the debt and costs, in case the plaintiff shall obtain final judgment, or unless the defendant shall within that time show sufficient cause before a judge of the Court, to the satisfaction of such judge, why judgment should not be entered; and that where such security is not so given the plaintiff shall be entitled to judgment, unless the defendant shall, on showing cause before the judge, either deny his execution of such security on oath, or admitting the execution, shall show to the satisfaction of the judge that the cause ought to proceed without giving such security.

“Where the defendant has acknowledged his liability by executing a written security, it seems to be unjust that the defendant should be allowed to impose on the plaintiff the expense and delay consequent on a defence, without either giving security to protect the plaintiff against the costs of a defence, which is inconsistent with the defendant’s own admission, or showing that he had some reasonable or probable ground of defence.”

The only other explanatory remarks, conveying any additional information, are those on the proposal for facilitating the cession of property to creditors:

“With this view it would be desirable to allow a certain proportion of creditors in number and value to have the power of discharging the debtor from his liability altogether, and to make the consent of a smaller or a greater proportion to be necessary according to the amount of the dividend.

“It would also be desirable to allow the insolvent a percentage in proportion to the amount of the dividend.”

Until what is meant by “a certain proportion” is explained, it is impossible to speak as to this proposal decisively.<sup>1</sup> With the exception of the two limiting the power of arrest, all the above propositions appear to us to be wise.

<sup>1</sup> In the statement submitted to Mr. Huskisson as to Mr. Bright’s bill to facilitate the operation of trust deeds, seven-eighths of the creditors in number and value was the proportion proposed. (Mr. Helps’ Communication, App. 39 b.)

*Final Process.*—So much only of this subject is discussed as respects the law of arrest, and that only so far as seemed necessary for the consideration of the Insolvent Laws. After briefly tracing the history, and pointing out the evils of the old law of arrest in execution, and alluding to the 23d Car. 2, c. 20, which recognizes the necessity of establishing some provision for the discharge of poor prisoners for debt, they proceed :

“ It was not till long afterwards that the legislature proceeded to make the just and rational distinction between the fraudulent and the merely unfortunate debtor, and until the year 1813, no provision of a permanent nature was made for the relief of imprisoned and insolvent debtors.

“ The present statute has three principal objects in view :

“ 1st. The personal discharge of the honest debtor, who surrenders all his property for the benefit of his creditors :

“ 2dly. The punishment of the dishonest debtor :

“ 3dly. The distribution of the insolvent's property, present and future, amongst his creditors.

“ Whilst the principles on which the insolvent law is founded are just and humane, the law itself has been found to be inadequate to the attainment of any one of these objects.

“ After attentive consideration of the practical operation of the present insolvent law, we feel ourselves bound to state, that the loud and general complaints of its effects are well founded.”

The objections taken, or rather adopted, in the Report, are :

1. That the present law leaves honest but unfortunate debtors, exposed to nearly all the evil consequences to which they were liable before its introduction, an imprisonment of two or three months, or even of shorter duration, being usually quite adequate to the ruin of a trader, in morals as well as credit and character.

2. That the system has a direct tendency to encourage the commission of frauds on creditors ; as the fraudulent cannot be punished without a degree of trouble and expense which creditors cannot be expected to undertake. “ The natural consequence is, that by far the majority of those who deserve punishment escape with impunity.”

3. "The third and remaining object is the assignment, administration and distribution of the insolvent's estate; that there should be little to distribute is not remarkable when it is considered that such creditors as arrest are usually those who have been induced to give credit, relying on delusive expectations of security."

Any one would suppose, from this passage, that there is a particular class of creditors that arrest; but the truth of the matter is, that all traders are in the habit of resorting to arrest, but only when they conceive themselves to have been imposed upon. What follows, however, corroboratory of this objection, is true—that a great part of the debtor's property is wasted, and no slight portion of it very frequently concealed.

"In making these remarks, which we feel ourselves bound to make on the constitution and practice of this Court, we are far from intending to impute the slightest degree of blame to the learned persons who preside there; the defects which we suggest are attributable to the law, which renders a Court so constituted necessary, as a remedy against the mischief occasioned by the general and indiscriminate power of imprisonment for debt.

"The practical effect of the Law of Arrest on Final Process, combined with the Insolvent Law, is the imprisonment of numbers merely to be discharged without opposition at the end of a few weeks; the consequence is misery, waste of funds, and multiplied frauds and perjuries; whilst no benefit arises to the creditor, the arrest, imprisonment and expense are ruinous to the debtor; in short, the ordinary consequence is disappointment and loss to the creditor, destruction to the debtor.

"Such being the evils which required a remedy, and such the change which has been made for the purpose of correcting them, it appears to us that the law is defective:

"In not making all the debtors' property directly liable to the execution of the judgment creditor:

"In making an arrest of the person to operate not merely as a means of procuring satisfaction from the debtor's property, but as a discharge of the debt, except when the debtor dies in prison:

"In making the imprisonment a condition precedent to the

personal discharge of a debtor who surrenders his property without fraud :

“ In not compelling the debtor to discover and surrender his property where he is in custody, and in not providing means for making all his property available when he absconds.”

Some well-founded observations on these propositions are subjoined, but each of them will be pretty generally assented to, except perhaps the third. This, however, has subsequently a condition attached to it, which renders it somewhat less objectionable.

“ It appears to us that it would be expedient to provide, that no debtor should be liable to personal arrest and imprisonment in execution on any judgment obtained against him in respect of which he would be entitled to petition and obtain his discharge under the present Insolvent Law, provided he forthwith gave security for making an immediate cession of his property for the benefit of his creditors, and for conforming in all respects with the Insolvent Law.

“ But that, in order to prevent fraud, the creditor should be at liberty, as well after as before judgment, by a judge's order under special circumstances, or upon an affidavit of belief that the debtor intended to delay the creditor by absconding, to arrest his person; but that in such case it should be competent to the debtor to obtain his discharge, either by a judge's order, or by putting in bail for his appearance and conformity with the Insolvent Law,”

If a man can procure such security, it certainly affords a very strong presumption that his insolvency is the result of misfortune. The arguments which follow, however, are any thing but convincing to us; for these proceed throughout on the fallacy, that the majority of imprisoned debtors are innocent. After so clearly accounting, too, for the neglect of creditors to oppose discharges, it is rather surprising to meet with such inferences as the following: “ In proof of this (that the imprisonment is of no service to the creditor) we may observe, that even where the debtor, as now, is imprisoned previous to his discharge, the creditor seldom avails himself of the opportunity for the purpose of examination or opposition. It appears from the evidence of Mr. Reynolds, that out of about 4000 prisoners not more than 1000 are opposed, so that on the average three out of four are discharged without opposi-



tion, but at an expense averaging £15 each debtor imprisoned in the country, and £10 each debtor imprisoned in town."

We do not like the following paragraph at all:

"That imprisonment in the case of a trader is inconsistent with the spirit and policy of the Bankrupt Laws, and that it cannot but be regarded as a hardship on an honest and industrious tradesman who does not owe debts of sufficient magnitude to bring him within the scope of the Bankrupt Laws, that he should be subject to imprisonment until the absence of fraud shall have been ascertained by examination and inquiry, whilst another, merely because he is more deeply in debt, should enjoy security from imprisonment, unless fraud be proved."

Surely the Commissioners must know why the operation of the Bankrupt Laws is confined to debts of a given amount; and that were they to be extended to all traders immediately, every existing argument for the retention of arrest would remain. The following paragraph is worse. It is a second attempt to take advantage of the almost inevitable anomalies existing in civilized society:

"That the severity shown to a debtor is wholly inconsistent with the humanity displayed by the law even to such as are charged with the perpetration of crimes. Whilst a debtor to the most trifling amount, however honest his intentions, is liable to be taken in execution and imprisoned, it may be indefinitely, from utter inability to pay ten times the amount of the debt in procuring a discharge by the Insolvent Court; the party charged with having obtained hundreds or thousands by false pretences, is treated with comparative indulgence, he is not committed to prison till a charge of fraud has been made upon oath sufficient to warrant that imprisonment, nor even then when he can find bail proportioned to his means; and thus whilst a poor but honest man, with a wife and large family, is sent to gaol for a debt of forty shillings, due for rent, and is not allowed even to undergo the ordeal of the Insolvent Court to obtain his discharge, except at an expense which he is wholly unable to pay; the criminal who has fraudulently obtained one hundred times that amount by false pretences, is admitted to bail, and suffers no imprisonment until conviction."

"If the law were judged of by its consequences, the con-

clusion would naturally be, that the omission to pay a debt afforded a stronger presumption of criminality than the most direct charge of actual fraud."

If any system of law were judged of by its consequences, it would be supposed to show peculiar favour to the rich; for money will always confer advantages in both civil and criminal procedure. We once saw a rich scoundrel, prosecuted for forgery, get off by the ingenuity of a counsel whom it cost him three hundred pounds to procure. Besides, the question as to the expediency of permitting the small debt courts to imprison as now, and excluding all from the benefit of an Insolvent Law who cannot pay particular fees, is entirely distinct from the general question of arrest.

To compel an imprisoned debtor to make a discovery of his property, it is proposed to make him liable to a criminal prosecution.

" 1. Where he has obtained credit by means of any false act, pretence or representation whatsoever.

" 2. Where, being indebted to any creditor to the amount of £     he has, after notice of suit commenced by such creditor for the recovery of his debt, delivered by way of gift or otherwise, or conveyed, aliened or concealed any property to the amount or value of £     , with intent to hinder or prevent such creditor from obtaining satisfaction of his debt, such offence, when committed after judgment, to be visited with severer penalties.

" 3. Where any debtor has, after judgment, wilfully secreted or absented himself to avoid legal process consequent on such judgment.

" 4. Where any debtor has, after having entered into a recognizance for a cession of his property for the benefit of his creditors, embezzled, secreted or disposed of any property in fraud of his creditors, or has wilfully absented himself at such times and from such places as may have been appointed for his examination, or wilfully and knowingly made, published or exhibited any false statement, account or document whatsoever, with intent to defraud, delay, or otherwise injure any creditor.

" We think that for the more effectual and certain punishment of fraud of this description, such facility should be afforded to prosecutions as is consistent with justice; and that

the expenses of prosecutions should be defrayed in the same manner as the expenses of prosecutions for obtaining money or goods by false pretences now are."

After one more page of tautology the Report concludes thus:

"Whilst we regret that the opinions of Your Majesty's Commissioners are not unanimous, we think it proper to observe, that this circumstance has occasioned a more attentive examination of the effects of the present law of arrest for debt by process from the Superior Courts than might have been deemed to be necessary had no difference of opinion existed. It may also be proper to observe, that although we have, upon consideration, thought it more advisable to abstain from any technical detail of the mode in which we think the alterations proposed might be effected, we have carefully considered the subject, and believe that such alterations may be conveniently accomplished with great advantage to all, more especially to the commercial classes of Your Majesty's subjects."

The large space we have permitted the four Commissioners to occupy, compels us, we are sorry to say, to be comparatively concise with Mr. Serjeant Stephen's admirable communication, which fills the same number of pages as the Report. The length, however, is in a great measure owing to the long quotations from the Appendix, which, standing, as he does, alone, he naturally deemed it necessary to make. We shall give his introductory observations as they stand:

"The undersigned Commissioner, not concurring with his colleagues in their views on the subject of imprisonment for debt, has not subjoined his signature to their Report; but he feels that he ought not to confine himself to that simple mark of dissent; and that upon a matter so highly important, the opinions of every member of the Commission should be fully expressed. He proposes, therefore, in the following pages to declare his own views upon the subject to which the Report relates. In taking this course he is anxious to escape the reproach of presumption, and to state that his views have been formed with all the caution, and are advanced with all the diffidence, which the solitary position of the writer demands. It may be expedient too to advert to the circumstance, that though he was one of the original members of the Common

Law Commission (which has produced three Reports prior to that now published), this is the first occasion on which his opinions have failed to harmonize with those of the body to which he belongs.

“ Before he proceeds to the discussion of any matters upon which disagreement has arisen, he gladly avails himself of the opportunity of expressing his concurrence in the principle of some of the alterations of law recommended in the Report.

“ He agrees with the other Commissioners in thinking that it would be highly desirable to allow a summary mode of proceeding of the kind which they suggest, in the case of bonds for payment of money only, bills of exchange and promissory notes. It appears, however, to him, that the security required as the condition of permitting a defence, should not be a security for payment of debt and costs absolutely, but in the alternative only, viz. for payment or render to prison, in the event of the plaintiff's obtaining judgment; as a defendant, who had a good case upon the merits, might yet be too indigent to find security for payment in the absolute form.

“ He concurs also in the recommendation, that all kinds of property (generally) should be subject to execution upon a judgment. With respect to the public funds, there may be difficulties in point of policy, arising from the consideration that this species of capital is protected from execution by the laws of France and America: but upon this point he does not feel himself competent to advise. It turns upon considerations which belong rather to the statesman than the lawyer.

“ He also coincides in the opinion that in all cases of liquidated debt the plaintiff should be entitled to recover interest. It seems doubtful, however, whether it would be right to calculate interest (as suggested in the Report) from the time that process is served on the defendant, as that would apparently tend to encourage and multiply suits. It would perhaps be preferable to calculate it from the time when a demand in writing of the debt should be served upon the defendant, with notice that interest would thenceforth be claimed.

“ It is upon the subject of imprisonment for debt alone that any difference of a fundamental kind has arisen among the Commissioners.”

This subject he accordingly divides into arrest before judgment, and arrest in execution. After a few sentences as to arrest before judgment, he decides on the consideration of arrest in execution first. His preliminary remark relates to the history of the law, which is shown to have been gradually undergoing alterations in favour of the debtor, till, from being unduly severe, it has become most injuriously lax. He then proceeds to combat the prejudices of those who hold imprisonment for debt to be essentially unjust, and contrary to the natural rights of man.<sup>1</sup> Such writers may mean well, but they are hardly worth arguing with. We pass on to his four main objections to taking away the power of arrest in execution, which are set forth in formal propositions, with the grounds of each of them annexed:

1. "If the power of arrest in execution be taken away, the creditor will be much more frequently defeated by the concealment of the debtor's property."

In support of this proposition it is urged, that as the effectual concealment of his property, if property only were liable, would be absolute immunity to the debtor, he would be under a strong and constant temptation to adopt that expedient; and the motive being thus supplied, there can be no doubt of his frequently possessing the power. Don Cambro-nero, the respondent as to Spain, observes, that it is easy in the present day to conceal fortunes and to carry millions in a portfolio. Secret trusts and colourable assignments are also constantly resorted to.

2. "If the power of arrest in execution be taken away, the debtor without property will have no inducement to make those efforts by which he now often succeeds in obtaining the means of payment."

This strikes us as almost self-evident.

3. "If the power of arrest in execution be taken away, the burthen and risk of realizing the property of the debtor will be constantly thrown upon the creditor, instead of being incumbent, as they ought to be, upon the debtor himself."

This also is sufficiently obvious; but there are two remarks

<sup>1</sup> See Crivelli de la Contrainte du Corps.

contained in the exposition of it which we think it advisable to state. He avers that no inference can be drawn from the admitted fact that creditors generally issue final process against the property in preference to final process against the person,<sup>1</sup> because the law attaches certain disadvantages to the latter. For instance, poundage cannot be levied upon a *capias*, but the plaintiff must pay the sheriff himself; whilst the caption of the person, though no benefit results, is a bar to any subsequent execution against the property. Again—

“ It has been said, that a creditor has no right to expect more facility in recovering his debt than is afforded by a free access to the property, because the debt was originally contracted on the credit of the property, and of that only. This appears to the undersigned Commissioner to be unsatisfactory. It is true, that in giving credit, the creditor may not have specifically contemplated the power of arrest; but he has always a general reliance upon the debtor's consciousness that payment will be necessary to save him from painful consequences; and the most painful consequence that attaches by law to his default is the imprisonment of his person. The obligation is *not* simply to allow payment to be exacted out of the property. Nobody would give credit on those terms. It is a general and absolute engagement to pay; and pledges the faith of the debtor, not only that the money shall be forthcoming, but that no delay, expense or risk shall be incurred in its recovery.”

4. “ The abolition of arrest in execution will encourage the practice of contracting debts improvidently, or with the direct purpose of defrauding the creditor, and will also encourage the debtor to dissipate property which ought to be applied to payment of his debts.”

A good deal of valuable information is contained in the observations confirmatory of this argument; and he here con-

<sup>1</sup> This is by no means the case invariably. Mr. Benjamin Willoughby, a gentleman of great intelligence, who, having recently served the office of under-sheriff of London and Middlesex, must be presumed to be well acquainted with such matters, gives it as his decided opinion that it seldom answers, in the present state of the law, to sue out an execution against the property. “ I do not mean (he adds) to deny that some *fi. fa's.* realize the amount of the levy to the plaintiffs, but, then, in looking through my books, I find that the average is not more than about one out of ten, and that entirely owing to the manner in which interests in property are concealed.” (App. 105, D.)

clusively answers the objections grounded on the evils alleged to result from the Insolvent Law.

“ If the Insolvent Court has been prejudicial to the creditor, the injurious effect is mainly attributable to the Insolvent Law itself, of which that Court is the mere instrument. It is the Insolvent Act, which has so reduced the ancient rigour of imprisonment as to allow the debtor his discharge after an average period of two months; and as he cannot be discharged without judicial inquiry into his past dealings, and the present state of his property, the Court follows as a sort of corollary from the Act.

“ Those who complain of the Court are in effect therefore complaining of the relaxation which the Law of Arrest has received; and their discontent, instead of leading to any inference unfavourable to the retention of that law, would rather serve to show the necessity of maintaining it in a severer form.”

Accordingly he suggests the propriety of some additional expedients for the chastisement of culpable insolvency, and the preventing of fraudulent concealment; and thinks that, in cases of remand for misconduct, the punishment of hard labour might be advantageously added to that of imprisonment. He joins with his fellow commissioners in exempting the Court itself from blame, charging all the mischief upon the law; and ingeniously parries the accusation founded on the small amount of the dividends. “ The amount of the dividend is no fair test of the utility of this Court. It is properly a court of discharge, and not of distribution. It is constituted to carry into effect a perpetual gaol delivery of debtors; and though it is also to take care that they do not escape with any remains of property, the latter function is incidental and collateral only to the former. To expect a considerable dividend from discharged insolvents involves a sort of contradiction.”

The following summary of the evidence is interesting, and, we can vouch from personal examination, correct:

“ The doubts above expressed as to the expediency of abolishing arrest in execution, are fully warranted by the state of the evidence before the Commissioners.

“ Of bankers, merchants and dealers, by wholesale and retail, in various parts of this kingdom, there have been examined on this subject since the date of the original Commis-

sion 332; of attornies, 102; of barristers, 11. Of the total number examined, not more than 61 have expressed any opinion favourable to the abandonment of arrest in execution; 201 have expressed themselves in terms from which no general conclusion can be distinctly drawn; the remaining 183 are apparently opposed to its abandonment.

"It is to be observed, too, that among the abolitionists there are but a small portion who hold their opinion in an absolute form. The majority always suppose the possibility of substituting some other method as effective as that which they abandon, and less open to objection. But it will hereafter be shown that this is a hopeless speculation, and that no satisfactory substitution for the existing practice can be made.

"Some weight ought also to be allowed to the example of other countries. The Commissioners have, therefore, thought it right to investigate the subject in this point of view, and the result is, that in almost every European state the creditor, in whose favour judgment has been given, is permitted not only to seize the property, but (alternatively) the person, in execution. Such, at least, is the state of law (as ascertained by the Commissioners) in France, Spain and the Netherlands, in Austria, Prussia, Hamburgh, Bremen, Lubeck, Norway and Sweden; and no exception has come to their knowledge, unless the case of Portugal is to be so considered, where the power of arrest would appear to be allowed to the creditor only under special circumstances. The same alternative right of proceeding against person or property exists in all the United States, except in the district of Maine and at New York; and these exceptions are of a merely experimental character, both being of origin so recent as the year 1831, and the latter of them not being even yet in actual operation.

"It having been shown that the law of Europe and of the United States corresponds in general with that of England in permitting the judgment creditor to resort to the person, it will be found that upon this matter the sentiments of foreign jurists are, for the most part, in consonance with the actual state of their law. Twenty-three opinions (which may be taken in general to express the sense of the legal profession in the countries to which they refer) may be perused in the Appendix; and of these not less than eighteen may fairly be considered as anti-abolitionist in their tendency."



We propose taking some future opportunity of examining the laws of other countries on this subject; and shall then consider two or three important distinctions which Mr. Serjt. Stephen points out. Assuming, as he seems entitled to assume, that he has now at least said enough to show that the abolition of arrest, without substituting an equivalent, would be wrong, he passes on to consider the equivalent proposed.

“ But it is said that an equivalent may be found. This expedient is to establish some general course of proceeding, by which a debtor, against whom a creditor proceeds for payment, shall be exempt from imprisonment, upon condition of his disclosing and surrendering his whole property upon oath; connected with provisions enabling the creditor, by judicial examination of the debtor himself, and all other persons cognizant of his dealings, to obtain a full discovery of his affairs, and to bring him, in case of fraud or culpable insolvency, to punishment. Such is the practical character of the proceeding already in force against traders under a commission of bankrupt; and in some quarters an opinion is entertained that in the event of the abolition of arrest, the creditor would be effectually protected by subjecting all persons, whether engaged in trade or not, to the operation of the Bankrupt Law.”

The answer is, that the whole system of bankrupt law is peculiarly adapted to persons in trade, and that, even as regards these, it has been far from giving general satisfaction. This is clearly shown to be the case in America and France, and our readers do not require to be told that England is very little in advance of other countries in this respect.<sup>1</sup> Mr. Serjt.

<sup>1</sup> As to America, Mr. Serjt. Stephen cites Kent's Commentaries, vol. ii. p. 321. See also the Law Mag. vol. vi. p. 154. The following is a striking testimony as to France:—“ Experience shows how it is. The trader declares himself *en état de faillite*; all proceedings are thus taken out of the hands of his individual creditors; and the commercial court alone decides upon his imprisonment or liberty. The judges are seldom severe in large cities like Paris, where there are on an average twelve hundred persons yearly in *faillite*. The judges are tired of these matters, &c. In small places must be added the personal acquaintance with the trader and his family. Hence traders care little for *faillite*, and an opportunity is given, and often abused, of enriching themselves thereby. A man without means, but without evil intent, sets up in trade on credit; is unable to pay, declares himself *en état de faillite*, comes easily out of the business, and establishes himself elsewhere.”—*Kritische Zeitschrift*, &c. vol. iii. The article is by Mr. Fœlix, Advocate, a valued correspondent of our own.

Stephen's statement, we fear, is rather too favourable to his own country :

" It is true that since then very important amendments have been made, and that a new Court has been recently appointed, from which the happiest results, so far as the administration of the system is concerned, may fairly be anticipated ; but after making due allowance for all ameliorations actually realized, the character of this branch of the law does not yet stand so high as to justify its receiving an universal instead of a partial application."

Another proposed equivalent is the plan of cession, formerly alluded to, which, without any further infusion of the principle of bankruptcy, might enable the insolvent to avoid imprisonment upon condition of surrendering his whole property to the general body of his creditors. Passing over the objection, that such a plan can have no effect on the debtor without property, nor, where there is property, relieve the creditor from the burthen and risk of realizing it,—it is shown that no such plan could work well without a frequent resort to the costly and complicated machinery which limits the practical operation of the Bankrupt Law to cases where the property is comparatively large.

" In those numerous cases which are now found not to afford a commission, and where the bankrupt is consequently left to find his way into the Insolvent Court, it would operate with such force as to make the proceeding by way of cession a mere mockery. If the Insolvent Court is now found to yield inadequate protection from fraudulent concealments and dispositions of property (as is commonly supposed to be the case), it is precisely for the reason here pointed out. But under any plan by which the insolvent should be delivered altogether from the fear of that imprisonment which must now precede his discharge, the evil would be much aggravated; because one powerful motive would be removed by which he is now frequently induced to pay his debts while any means of payment remain.

" This is a difficulty which cannot in the nature of things be surmounted. With whatever economy any judicial plan for investigating the affairs of a debtor may be devised, and whether it be attended with the formalities of a commission

or not, its necessary expensiveness will throw it, in many cases, out of use. Here is a perpetual infirmity incident to the constitution of every court administrative of the petty remnants of an insolvent's property."

The same reasons, combined with the reluctance of creditors from compassionate motives to prosecute, would render penal provisions nugatory:—"On this subject again satisfactory illustration may be found in the present history of the Insolvent Court. Its powers of punishment are crippled by the inactivity of creditors, and excite apparently little alarm. It is the precedent imprisonment, and not the risk of demand, by which the ill-disposed are mainly held in restraint.

"If the insolvent should be allowed to make cession by a mere spontaneous act, as well as at the instance of the creditor, the danger of fraud would be still farther increased. For in that case he would be able to choose the time most convenient for himself; and he would be able to prepare for the occasion by an artful adjustment of his books and accounts. The creditor might also be frequently defeated by his selecting a period when particular witnesses were out of the way, or he had reason to expect an accession of fortune not yet fallen into possession."

At the same time, Mr. Serjeant Stephen admits that the power of compelling a cession may be advantageously conferred on the creditor, and that the provision to this effect in the Lords' Act should be generalized. He would also improve the situation of the debtor in some respects. He would empower the insolvent court, with the consent of four-fifths of the creditors, to discharge the debtor from all future liability for his debts; "for there can be no doubt," he says, "of the truth of the remark made by some of the witnesses whom we have examined, that the liability of the after-acquired estate, though rarely productive to creditors, is apt to paralyze the future exertions of the discharged insolvent, and to throw a gloom over the remnant of his days."<sup>1</sup> But he would postpone such order of discharge until the period of a year shall have elapsed. "In this interval there will have been opportunity to watch the conduct of the insolvent, and to form a

<sup>1</sup> See the remarks of Messrs. Watson and Byrom, Appendix (C.) No. 47, Answer to Q. 8. on Final Process.

better judgment whether he deserves the indulgence." He would also imitate the law of Scotland in allowing the sick and insane to be discharged upon the production of a medical certificate, and provide that, after a year's imprisonment, an insolvent, incapable of paying the expenses of his discharge, shall have those expenses defrayed for him out of the county rate.<sup>1</sup> "To allow this at a much earlier period would evidently be objectionable, from its tendency to prevent due exertion and economy on the part of the insolvent himself, and to throw the expense in every case upon the public."

"Having now," he continues, "stated the reasons for maintaining the practice of arrest in execution (subject only to the particular improvements which have been suggested,) it remains to consider the evils by which that practice is attended, and to weigh them against its advantages. In truth, the evils are no other than is necessarily implied in the very name of imprisonment, the deprivation of personal liberty, the interruption of domestic duties and enjoyments, the loss of time which might have been applied to productive labour, the damage in some cases done to mercantile or personal reputation, the occasional contamination to the morals by bad society."

The question therefore is, whether the infliction of so much personal evil is called for by the exigencies of society, a question which can only be solved by fully weighing all the considerations suggested by the Report. To urge the common evils of imprisonment, is urging just nothing at all. Mr. Serjeant Stephen's remarks on this subject are excellent, though rather too long to quote, but we cannot consent to pass over his mode of disposing of the argument which his fellow Commissioners deduce from the present state of credit:

"Before this part of the subject is dismissed, it will be expedient to notice a prevalent fallacy calculated to weaken the natural force of the arguments on which the writer has had occasion to rely. Those arguments are mainly founded on the importance of arrest to the security of the creditor. Now there is a class of theorists disposed to look with coldness at least, if not distrust, upon any reasoning of that cast. They remark that credit has already an undue facility and extension in this country; and they infer from this, that its repression

<sup>1</sup> The expense is about 10*l.*, chiefly incurred in giving notice to the creditors.

would be no evil. But in this manner of considering the subject, an obvious distinction appears to be overlooked. Credit is of two kinds. It may be given without the intention of incurring any risk beyond what is ordinarily incident to the cautious trader, or it may be given with the intention of incurring extraordinary risk, to cover which an increased price is exacted from the customer or from the public. The former may be properly described as *wholesome*, the latter as *pernicious* credit. The former is that of the respectable dealer; the latter is the credit given by the usurer, or the tradesman who supplies an extravagant minor without the knowledge of his friends, or who sells goods to a customer whose solvency he knows to be precarious. It seems obvious, that with respect to both these modes of dealing, whatever tends to diminish the security of the creditor must also have a necessary tendency either to diminish the facility with which he bestows credit, or to raise the price which he demands. So far as the pernicious species of credit is concerned, neither of these consequences perhaps is to be deprecated; but it surely cannot require much argument to prove that, with respect to that which is of an opposite character, the case is just the reverse. A diminution of that portion of commercial credit which is of a wholesome quality, or an increase of the price at which it is obtained, would be a result of the most perilous description, such as in no country would be contemplated without alarm, and least of all, in Great Britain, in her present position of acknowledged financial difficulty. Credit has been described by one of our correspondents as the main spring, by another as the life-blood of our system; and neither of the metaphors, if applied to credit of the kind last referred to, does more than justice to the important truth which it is intended to illustrate."

So much for Arrest in Execution. Now for Arrest before Judgment, which cannot be properly considered apart. After a few remarks on its history, Mr. Serjeant Stephen proceeds to state his reasons for thinking its continuance under certain modifications desirable. They are presented in the same form as the reasons already urged for retaining arrest in execution:

" 1. If the power of arrest before judgment be taken away,

the creditor will be much more frequently defeated by the absconding of the debtor." This is almost self-evident, and it will not be very easy for the rest of the Commissioners to protest against it, after arguing that a mere notice would probably neutralize the supposed advantages of arrest. But the strongest testimony on this subject is given by Mr. Burchell, a gentleman of great experience in the office of under sheriff, who declares that the officer on an average fails to find the defendant in fifty cases out of a hundred of intended arrest after judgment, and not more than thirty before. The evidence of the following persons is adduced in support of this argument: Mr. W. Holmes, grocer, Newcastle-upon-Tyne; Mr. John Rowntree, grocer, Scarborough; Messrs. Harding, Smith, and Stansfield, bankers, Burlington; Messrs. Cousins and Kemp, tea dealers, London; Mr. John Hartley, of Leeds; Mr. Peter Wells, merchant, Hull; Messrs. Fox and Co. bankers, Plymouth; Messrs. Hadfield and Grave, attornies, Manchester; Messrs. Howards and Harrison, attornies, Preston; Mr. J. Gardner, Sion-hill, Garstang.

Mr. Serjeant Stephens objects to confining arrest to cases where a judge's order is obtained, on the following grounds:

"If the affidavit in support of such an application were not required to state the grounds of belief, the judge would have no discretion to exercise, and his interposition would have no effect but to produce unnecessary expense and delay; while, on the other hand, the vagueness of the affidavit would present great temptation and facility to perjury. But if the practice required the affidavit to state the grounds of belief, the application would no doubt be often unsuccessful in cases where an arrest ought in justice to be allowed. For independently of the natural and proper tendency in the judges to decide in favour of liberty, where the circumstances are doubtful, it would frequently be very difficult to state, on oath, circumstances sufficient to warrant a judicial presumption of meditated flight, even where the belief existed, and reasonably existed, in the mind of the deponent, that the defendant was about to abscond. That belief might be founded (for example) upon facts reported by other persons, whose affidavits it might be impossible to procure."

He also urges that a creditor may feel it necessary to pro-

ceed by arrest in consequence of general impressions, in support of which it would be difficult to produce any definite overt act, and that, at all events, the additional delay would be considerable.

“ 2. If the power of arrest before judgment be taken away, the creditor will be much more frequently defeated by the removal of property.”

This objection almost resolves itself into the last, as when the debtor absconds, he will naturally take with him all the property he can lay his hands on. Few will doubt of the force of this objection when they find that, in the average number of suits, judgment is not obtained in less than three months, and in cases presenting more than ordinary difficulty, in probably not less than six. This is Mr. Serjeant Stephen's estimate. He quotes the following authorities in support of this argument: Messrs. Cotton and Crosby, grocers, York; Messrs. Simpson and Nottidge, bankers, Braintree; Messrs. Cousins and Kemp, tea-dealers, London; Mr. John Thompson, Bridlington; Messrs. Ridley, Bigge, Gibson and Co. bankers, Newcastle; Mr. James Robinson, banker, Chesterfield; Messrs. John Fretwell and Son, Gainsborough; Messrs. Francis, Turner, and West, attornies, Norwich; Messrs. Paynter and Witford, attornies, St. Columb, and Mr. Thurston Collins, attorney, St. Austle.

“ 3. If the Power of Arrest before Judgment be taken away, it will be much more frequently impossible to obtain payment without suit, and the attempt to recover payment by suit will be more frequently unsuccessful, and will be attended in general with more delay and expense.”

This objection is exclusively illustrated by extracts from the Appendix. The following are the names of those whose authority is cited in support of it. Mr. Wm. Tooke, Attorney, London; Mr. John Wood, Attorney, York; Mr. William Vizard, Attorney, London; Sir J. D. Paul, Bart. Banker; J. R. Ward, Esq. for Veres and Ward, Bankers; Messrs. Rogers, Towgood and Company, Bankers; John Martin, Esq. Partner in the House of Martin, Stone and Company, Bankers; Mr. Robt. Spence, Draper, North Shields; Mr. William Holmes, Grocer, Newcastle-upon-Tyne; Messrs. S. J. Vachell and James, Music Merchants; Messrs. Thew and

Sons, Alnwick ; Messrs. Gregory and Brother, wholesale Grocers, Halifax ; Messrs. Crosse and Company, Soap-makers, Hull ; Messrs. Wilson and Company, Tobacco Manufacturers, Sheffield ; Mr. J. Yorke, Banker, Peterborough ; Messrs. Brandrum, Brothers and Company ; Messrs. Mills and Kit-chener, wholesale Tea dealers, London ; Messrs. Phipps, Biggs and Bannister, Bankers, Warminster ; Messrs. Taylor and Dyson, Bankers, Diss ; Mr. Joseph Russell, Merchant, Bristol ; Messrs. Bell, Brodrick and Bell, Attornies, London ; Mr. Edward James, Attorney, Presteigh ; Mr. Samuel William Turner, Attorney, Sheffield ; Messrs. Hunt and Sons, Attornies, Stourbridge ; Messrs. Howards and Harrison, Preston ; Mr. R. Henry Anderson, Attorney, York ; Mr. Kenrick Collett, Attorney, London ; Messrs. Payne and Eddison, Attornies, Leeds. We select two of the most striking of these authorities—those of Mr. Tooke and Mr. Vizard :—

“ *Mr. Wm. Tooke.*—I can speak as the result of my experience, and of an attention directed to the subject for some years past, from the discussions which have taken place on the law of arrest, that in my opinion it would not be less merciful to a defendant than beneficial to a plaintiff, that the sum (to authorize an arrest before judgment) should not be increased from the present amount of 20*l.* One of my reasons for coming to that conclusion is, that a large proportion of debts sued for are paid upon the threatened arrest, with the comparatively small amount of costs which have then attached, whereas in most cases of serviceable process, defendants are induced to delay arrangements for such payment or compromise from time to time, until influenced by the fear of instant arrest or an execution, they ultimately arrive at the same predicament of compulsion, which would thus only have been anticipated by bailable process in the first instance, and a large accumulated load of costs saved to both plaintiff and defendant.”

“ *Mr. W. Vizard.*—I do not enter into the question, whether it be right or not, that in any case personal liberty should be sacrificed in satisfaction of or as a security for a civil debt. But if there is to be an arrest for debt, my practice satisfies me that to hold to bail on mesne process is, generally speaking, not less mercy to a defendant, than justice to a plaintiff ; I have seen continually, that where a defendant is served with a writ and not arrested, as he feels no immediate pressure, he pays no attention to it, until at last he is taken in execution with an accumulation of costs, which in such



cases often exceed the amount of the debt ; and that frequently the creditor thus not only loses his debt, but has also to pay all the costs incurred, from the inability of the defendant to pay the amount, whereas if the defendant had been pressed in the first instance, he would readily have paid the smaller sum which constitutes the debt. For this reason, I have often advised a creditor to submit to the loss of a small debt rather than proceed at all, unless he could hold the defendant to bail. I believe, nevertheless, that creditors will generally proceed and take their chance of recovery, and that costs will therefore be multiplied if arrest on mesne process should be abolished."

Mr. Serjeant Stephen admits, towards the end of this argument, that the improvements effected or about to be effected in law proceedings, will weaken it.

" 4th. If the Power of Arrest before Judgment be taken away, it will (like the abolition of arrest in execution) encourage the rash and fraudulent contracting of debt, and the dissipation of the property out of which the creditor should be paid."

This, it is to be observed, is the argument which abolitionists almost always undervalue, and some of them, like the four Commissioners, altogether forget or deny. In their opinion, the creditor places a very dangerous degree of reliance on arrest, whilst the debtor has not the slightest apprehension of it. The following gentlemen however decidedly think with Mr. Serjeant Stephen, that the fear of arrest has the strongest influence in preventing dishonest and extravagant persons from contracting debts; and, from what we know of human nature, we should say, that they must of necessity be right. John Martin, Esq. Partner in the House of Martin, Stone and Company, Bankers; Messrs. Phipps, Biggs and Bannister, Bankers, Warminster; Messrs. Thomas Stapleton and Company, Bankers, Richmond, Yorkshire: Messrs. Brown, Martin and Brown, Attornies, London; Messrs. Watson and Byron, Attornies, Liverpool.<sup>1</sup> In addition to these authorities we are anxious to call attention to the statement of an experienced and highly intelligent contributor, whose com-

<sup>1</sup> A very interesting document, entitled " Reasons for the continuance of the Process of Arrest for the good of the Commonwealth, 1659," is inserted in this part of the Report. In it almost all the best reasons against the abolition will be found.

munication as to another point is quoted in the principal Report. Mr. T. Foster, the gentleman in question, is asked :

“ You carried on business of course before the Insolvent Laws were enacted ? I did.

“ Have you found that they have made any difference ? A vast difference for the worse. I consider that the increase of risk in trading is almost ten to one.

“ In what way does that increase the risk ? By the bad debts we have necessarily made ; for with all the care we can take, our debts are more than treble in amount.”

Now, if this gentleman's authority be admitted, it proves that the fear of punishment is the principal check upon that description of fraud to which the mercantile man is more particularly exposed, and that traders, whose transactions are numerous, cannot possibly exercise that inquisitorial exactitude which the abolitionists demand of them. We really know no answer to this argument which would not constitute an all-sufficient reason for repealing the statute against obtaining money under false pretences, and telling people to look to themselves. It is true indeed that the four Commissioners propose enacting specific penalties for fraud, but we deny that specific penalties could possibly produce the anticipated effect. The only proper jury to sit in judgment on the insolvent debtor are his creditors ; we would leave it to them to say whether his general course of trading has been such as to merit indulgence or punishment ; and if their impressions were unfavourable, we would compel him to undergo a certain period of imprisonment, though no specific act of dishonesty could be proved against him. It is well known that creditors at present err on the side of indulgence ; but, at any rate, ample checks, as we formerly demonstrated, might be provided both against malicious arrest and the malicious prolongation of imprisonment.

And here we are obliged to stop. Mr. Serjeant Stephen, indeed, goes on to answer the leading arguments of the four Commissioners in detail, but we have already pointed out their principal fallacies, and enough, it is to be presumed, has been said by this time to put our readers on their guard against the rest. Our best apologies are due to Mr. Serjeant Stephen for the broken and abridged condition in which we

have presented his argument; but the discussion is only just beginning, and should any misapprehension as to his opinions occur, we shall gladly seize an early opportunity of correcting it.

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ART. III.—ON THE TITLE TO A BILL OR NOTE BY INDORSEMENT.

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As it will necessarily be some time before this topic comes to be considered in the regular course of the papers on Mercantile Law in this Magazine, we are induced shortly to call the present attention of our readers to it, in consequence of a recent decision of the Court of King's Bench, opposed, as it seems to us, as well to sound principle as to the weight of all the more valuable authorities; although it has the support of one or two reported *Nisi Prius* cases, and is said to be consistent with the recent *Nisi Prius* practice. We allude to the case of *Heath v. Sansom and Evans*, 2 *Barnewall & Adolphus*, 291. This was an action by the indorsee against the alleged makers of a promissory note, which it appeared had been given by the defendant Sansom, in the joint names of himself and Evans, his partner in trade, in discharge of his own private debt to his co-partners in another firm (the Droitwich Salt Company) of which also he was a member, and they had indorsed it to the plaintiff. The latter had not received any notice to prove the consideration to him; and he tendered no evidence of such consideration. There were, however, circumstances in the case, elicited on the cross-examination of the plaintiff's witnesses, tending to a suspicion that the note had been indorsed to the plaintiff, not *bonâ fide* for a valuable consideration, but to enable him to sue Evans, in fraud of whom it had been originally made, and whom the indorsers certainly could not sue in their own names. Such a suspicion, thrown upon the title of the indorsee, it was fit that he should be called upon to clear away. But the Court

went farther than the circumstances of the individual case required, and the majority of the judges (Lord Tenterden, Mr. Justice Littledale, and Mr. Justice Patteson,) laid down the broad rule that, "according to the *more recent practice*,"<sup>1</sup> if the note or bill were taken under such circumstances that the indorser himself could not recover, even though his disability arose out of a mere want of value given by him, the indorsee is bound to prove (even without having notice and even as against the acceptor or maker,) that *he* gave a valuable consideration for the indorsement. This is the position—a most convenient one for the acceptor of accommodation paper—which we have ventured to characterize as irreconcilable equally with principle and authority. Mr. Justice Parke dissented: "I have always understood," said that most learned and acute judge, "that an indorsement must be taken, *primâ facie*, to have been given for value, and that the proof, at least of circumstances tending to throw suspicion on such indorsement, lies on the party disputing its validity, before the indorsee can be called upon to prove that he gave value for the bill." We shall endeavour to show that this is a principle which, founded as it is in the nature and essence of bills and notes as negotiable instruments, has also been repeatedly and deliberately recognized by well-considered decisions, until the occurrence of the few *Nisi Prius* cases to which we have alluded, (we give the substance of them below,<sup>2</sup>) and by

<sup>1</sup> We can hardly understand how the question involved in this case could be considered to resolve itself into a point of *practice*. Whether before impeaching the indorsee's title, the defendant should or should not be required to give him notice, may properly be deemed a matter of practice; but the question here was, whether original want of consideration amounted to any impeachment of the indorsee's title at all; a pure question of law, depending on the principles by which the negotiability of bills and notes is to be regulated.

<sup>2</sup> *Thomas v. Newton*, 2 Carr. & Payne, 606. Indorsee against acceptor. The defence was, that the bill was given for stockjobbing differences; but it stood ultimately on the evidence simply that there was no valuable consideration as between drawer and acceptor. Lord Tenterden: "If the defendant shows that there was originally no consideration for the bill, that throws it on the plaintiff to show that he gave value for it, or that value was given for it by Dandridge; for if either the plaintiff or Dandridge gave value for it the plaintiff may recover, otherwise the defendant is entitled to a verdict."

*Dandridge v. Corden*, 3 C. and P. 11. Indorsee v. acceptor. The drawer was called to prove an illegal consideration as between him and the acceptor; but refusing to answer, Lord Tenterden said he could not be compelled, but if he persisted

which, furnishing as they do the sanction of Lord Tenterden's justly valued opinion, a door has been silently opened for the formal introduction of the doctrine established in *Heath v. Sansom*,—a doctrine which must undoubtedly tend to impede the negotiability of bills and notes, to entail much additional expense upon even a *bonâ fide* indorsee, and to throw an additional protection round the manufacturers of accommodation bills,—consequences, the mischief of which is likely to be counterbalanced, as it seems to us, by little accompanying benefit.

That a bill of exchange or promissory note carries with it, as part of its negotiable character, a presumption of consideration, especially when it has come into the hands of one not a party in its original concoction, has long been known as a distinguishing attribute of these instruments, not belonging to any other parol contract; and which the law has conferred upon them for the purpose of facilitating the almost universal commercial intercourse carried on by the assignment of negotiable securities. In this respect they were considered to stand on the same footing with specialties, and, like them, to bind the party making them, although without adequate consideration; the plaintiff in an action on such an instrument, not being required to prove that he gave value for it, the defendant not being at liberty to prove that *he* received none, unless as against the party with whom he was immediately concerned in its negotiation.<sup>1</sup> Before the statute of Anne, the only objection we find stated to a declaration on a promissory note, is that it did not import a consideration like a specialty, though bills of exchange, the ancient and acknowledged instruments of mercantile intercourse, did.<sup>2</sup> Thence it is, that a bill or note need not express that it was given for value received; and that when they are declared on, even in *assumpsit*, the consideration is never stated. And as every

in refusing, it would stand on the evidence that there was no consideration. The report does not state what course the cause afterwards took; but Lord Tenterden's language clearly intimates that he considered the want of consideration as a sufficient answer to the plaintiff's *primâ facie* title.

<sup>1</sup> Bull. N. P. 270; 2 Atk. 182; *Simmonds v. Parminster*, 1 Wils. 189; *Ashhurst, J. in Lickbarrow v. Mason*, 2 T. R. 71; *Philliskirk v. Pluckwell*, 2 M. & S. 395.

<sup>2</sup> *Clerke v. Martin*, and *Potter v. Pearson*, Lord Raym. 757, 759, 1 Salk. 129.

indorser is in the nature of a new drawer,<sup>1</sup> it follows that every *indorsement* also *prima facie* imports a consideration, and that the indorsee has a new title of his own in respect of the indorsement, and does not claim by the title of any prior holder.<sup>2</sup> Such being his situation, what, on the other hand, is that of the acceptor—or in the case of a promissory note, of the maker? “He who accepts a bill, whether for value *or to serve a friend*, makes himself in all events liable, and nothing can discharge him but payment or release.”<sup>3</sup> He makes himself a debtor to all the parties to whose hands the instrument shall come *bona fide*, and it is for *him* to discharge himself from that liability by showing, not that he chose to accept without consideration, but that the party suing him, either from the circumstances under which he took the bill or from his own express agreement, is incapacitated from maintaining his suit. Chief Justice Eyre thus states the principle:<sup>4</sup> “No evidence of want of consideration was ever admitted in a case between an acceptor or drawer, and a third person holding the bill for value. And the rule is so strict, that it will be presumed that he does hold for value until the contrary appears. How does the contrary appear from the fact that the *defendant* gave no value? The *onus probandi* lies on the defendant. If it can be proved that the *holder* gave no value for the bill, then indeed he is in privity with the first holder, and will be affected by every thing which would affect that first holder.” The same doctrine is supported by the high authority of Lord Eldon. In a case before his lordship at *Nisi Prius*,<sup>5</sup> when Chief Justice of the Common Pleas, the plaintiff, suing as indorsee of a bill against the acceptor, rested his case on the formal proof of the acceptance and indorsement: the defendant proposed to prove that he accepted without consideration: Lord Eldon said, “If a person gives a bill of exchange for a particular purpose, and that is known to the party who takes the bill, as for example if to answer a

<sup>1</sup> See *Brown v. Harraden*, 4 T. R. 149; Chitty on Bills, 141; and the cases there cited.

<sup>2</sup> See *Beauchamp v. Parry*, 10 B. & C. 91; *Lloyd & Welsby*, 336.

<sup>3</sup> *Mansfield, C. J. & Heath, J.*, in *Fentum v. Pocock*.

<sup>4</sup> *Collins v. Martin*, 1 B. & P. 651.

<sup>5</sup> Taunt. 196.

particular demand, then the party taking the bill cannot apply it to a different purpose; but where a bill is given under no such restriction, but given *merely for the accommodation of the drawer or payee*, and that is sent into the world, it is no answer to an action brought on that bill that the defendant, the acceptor, accepted it for the accommodation of the drawer, and that that fact was known to the holder; in such case the holder, if he gave a *bona fide* consideration for it, is entitled to recover the amount, though he had full knowledge of the transaction;" not going on to intimate that the evidence tendered by the defendant would put the indorsee to prove *extrinsecus* that he *did* give a *bona fide* consideration, but denying to such evidence all effect whatever. And in a subsequent case in the House of Lords,<sup>1</sup> speaking of the decision in *Fentum v. Pocock*, by which it was determined that time given by the indorsee to the drawer is no discharge to the acceptor of an accommodation bill, known to be such by all the parties, his lordship said, "the Solicitor-General says that the Court of Common Pleas have determined, that though one receives a bill of exchange with the knowledge that it is an accommodation bill, yet the acceptor is bound to pay. If that went upon this principle, that with a view to the benefit of commercial intercourse you would not inquire into the knowledge of parties, but that all should be taken according to the natural effect of the bill, as appearing on the face of it, I think that a most wholesome principle." The Court of Common Pleas have even determined,<sup>2</sup> that it is not of itself any defence for the acceptor to the suit of the indorsee to plead that the bill was accepted for the accommodation of the drawer, and was by him indorsed to the plaintiff *when over due*. Mansfield, C. J., there says, "There is no allegation of fraud in this plea, nor any averment that the plaintiff did not give a valuable and full consideration for this bill; it must therefore be presumed that he did, and that there is no fraud in the transaction." And Chambre, J., "It was never meant that the defendant should have any consideration for the bill. If he had lent money, it would have been without consideration; but he could not perhaps lend money, he therefore lent

<sup>1</sup> *Bank of Ireland v. Beresford*, 6 Dow. 237.

<sup>2</sup> *Charles v. Marsden*, 1 Taunt. 224.

a bill. He is not hurt, if he cannot be called upon before the bill is due. There is no fraud or collusion; the indorsee receives this as he would receive any other bill.”<sup>1</sup>

The question we are discussing had been brought under the consideration of the Court of King’s Bench, a very short time before it was mooted in *Heath v. Sansom*, in the case of *Mann v. Lent*.<sup>2</sup> The learned judges who were present when that case first came on for argument (Bayley, J., Littledale, J., and Parke, J.,) appeared then to consider the doctrine we have been illustrating so well established, that they at once called upon the counsel for the defendant (the acceptor, as was alleged, without value) to state whether he really meant to contend that the plaintiff, the indorsee, was bound to give evidence of consideration, and on what grounds; and it was only on his assurance that Lord Tenterden had so ruled under similar circumstances, and after conferring with his Lordship, that they adjourned the argument to be heard by the whole Court. The question, however, was ultimately evaded in that case, the decision turning on the ground that the consideration had not, in fact, wholly failed.

To the principle thus so frequently affirmed, before the judgment in *Heath v. Sansom* (or at least before Lord Tenterden’s decisions at *Nisi Prius* on which that judgment rested), the exceptions which had been admitted were rather apparent than real; all falling within the limitation stated by Lord Ellenborough, that in order to call upon the indorsee to prove consideration *aliunde*, some suspicion must first be cast upon his title by showing that the bill was obtained from the defendant, or some previous holder, *by force or by fraud*.<sup>3</sup> Thus, where the drawer had given the bill, not only without consideration, but under duress—under a threat of personal violence and confiscation of his property, the same learned judge ruled, and nobody can doubt most rightly, that the defendant not having been a free agent in the creation of the instrument, such a taint attached to the subsequent title to it, as

<sup>1</sup> In the last edition of Bayley on Bills, the note of this case is followed by a *sed quare*, whether of the learned judge himself or of the editor, we are not aware, but added, no doubt, in consequence of the *nisi prius* ruling of Lord Tenterden.

<sup>2</sup> 10 B and C. 877; L. and W. 320.

<sup>3</sup> *Reynolds v. Chettle*, 2 Campb. 596.



made it incumbent upon the holder to shew by extensive evidence that *he* came by it *bonâ fide*.<sup>1</sup> Indeed, the only question with us is, whether the party under such circumstances ought to be held liable in any case. So, where the drawer had received no consideration, and had been tricked out of the bill by a gross fraud; here also it was held that the plaintiff (who was, moreover, the immediate indorsee of the party committing the fraud) was bound to prove consideration.<sup>2</sup> Again, in an action by an indorsee against several defendants as partners in a trading company and acceptors of a bill, the defendants having proved that by the articles of the company the members were prohibited from circulating bills or notes, Lord Ellenborough said,—“An indorsee may recover on a bill against partners in a concern, though the drawing or accepting were contrary to agreement between them, and by one of the partners *in fraud* of the rest; but then the indorsee must shew that he gave value.”<sup>3</sup> In the case of a lost or stolen bill or note, a further weight of proof has, by a series of modern cases, not unreasonably, and certainly beneficially, been cast upon the holder;—to shew, not only that he gave value for the instrument, but also that he did not take it out of his ordinary course of business, or under circumstances which ought to have excited the suspicion of a prudent and careful man—this being considered, in the language of Mr. Justice Bayley, “part and parcel of the *bona fides*.”<sup>4</sup>

Even where the defendant has had it in his power to adduce such evidence of fraud or force as should render it incumbent on the indorsee to sustain his title by proof of consideration, it has been made a question in several cases whether he should be permitted to do so without having given the plaintiff such reasonable notice of his purpose as to enable *him* to be prepared with the proof required of him. In the Common Pleas, in conformity with a deliberate decision of that Court,<sup>5</sup> such notice is still held necessary; in the other Courts a rule better

<sup>1</sup> *Duncan v. Scott*, 1 Campb. 100.

<sup>2</sup> *Rees v. Marquis of Headfort*, 2 Campb. 574.

<sup>3</sup> *Grant v. Hawkes*, Chitty on Bills, 31, note b. And see *Green v. Deakin*, 3 Stark, N. P. C. 347; *Paterson v. Hardacre*, 4 Taunt. 115.

<sup>4</sup> *Gill v. Cubitt*, 3 B. and C. 466; *Down v. Halling*, 4 B. and C. 330; *Snow v. Peacock*, 3 Bing. 406; *Slater v. West*, Dans. and Lloyd 15; and other cases.

<sup>5</sup> *Paterson v. Hardacre*, 4 Taunt. 114.

founded in principle, and perhaps more reasonable, is established; that as the evidence is natural to the issue on the record, it cannot be excluded on the ground of want of previous notice, although it is matter of comment if notice were not given at all, or not given at a reasonable time.<sup>1</sup> If, however, as it seems, this principle is to be applied also to every case of an accommodation bill, the consequence will be, that an innocent indorser, whether apprised of the intended defence or not, must come prepared—necessarily at a considerable increase of expense—to prove that value was given for some one at least of the indorsements. Where practitioners of respectability are concerned, it is, nevertheless, and will continue to be the practice, from a mere principle of fair dealing, to give such notice; but the defence of accommodation acceptors and indorsers falls too frequently into far different hands. The inconvenience against which the new doctrine is directed is said to be, that a party who could not himself sue upon a note or acceptance, could put it into the hands of a third person, and in consequence of such transfer, the proof of value given would be dispensed with. But in the case of a mere accommodation bill, if it be “put into the hands of a third person” in the ordinary course of its circulation, where is the inconvenience, or where the hardship, of enforcing it in the ordinary manner against the party who, with his eyes open, has chosen to lend himself to such a liability? If it be transferred under circumstances which raise a suspicion of collusion, that is a different matter; that may be proved, and, being proved, amounts to a substantial impeachment of the transferee’s title. But whether inconvenience may or may not result from the former doctrine, we cannot help apprehending that from the new may proceed much more inconvenience—in many cases positive injustice; besides that it is, in our humble consideration, inconsistent with sound legal principles, which have received the sanction of the highest judicial authority.

W.

<sup>1</sup> Manni v. Lent, 1 Moody and Malkin.

ART. IV.—ON THE LIABILITY OF A HUSBAND MARRYING DURING HIS MINORITY, TO THE DEBTS OF HIS WIFE CONTRACTED PREVIOUSLY TO THE MARRIAGE.

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THE union of a married pair is in the law considered so perfect that they are deemed one. Of this union the husband is the representative, and, as "*caput mulieris*," is invested with her rights and burthened with her liabilities. In ordinary cases her separate existence is so completely annihilated, that they become "*quasi unica persona caro una et sanguis unus*," and all her rights and all her liabilities, as well those which arise subsequently to the marriage as those which existed previously, are transferred to the husband; and he continues thus to represent her as long as their union endures, and as soon as that is terminated by the death of either party, the husband or his representatives cease to be interested in her separate rights, and at the same time are exonerated from the debts and engagements of the wife contracted before the marriage.

The few instances in which a husband is freed from answering the engagements of his wife—as in the instance of her elopement—or of her separation with a suitable provision—or of her gross extravagance, without her husband's sanction, and with the connivance of creditors—do not impugn the general rule, but are exceptions which illustrate it; in the former instances the intimate union which forms the basis of marriage and its dependent consequences, is impaired, and, in the latter, the "*caput mulieris*" has been party to no engagement.

Although infants are for the most part prohibited from entering into contracts, marriage is not forbidden to them; the reason of their disability for contracting in general is, that they may not be induced to enter into engagements injurious to their interests, whilst their inexperience renders them open to deception; but a higher policy requires the marriage contract to be indissoluble, and, perhaps, the gallantry of the reader may induce him to think that the reason for excluding an infant from other contracts is ill applicable to the blissful bond of matrimony. We accordingly find that the Common

Law permits marriage to be contracted at any age, and whilst it renders indissoluble the union of a male of fourteen with a female of twelve years of age, it allows infants of more tender years to engage in an imperfect contract of matrimony, which, on attaining those ages, they may either abandon, or, agreeing to adhere to it, may render perfect and binding. The Statute Law requires all persons, on entering into a contract of marriage, to comply with certain ceremonies, but creates no disqualification in infants from engaging themselves in the marriage contract; for the purpose of preserving to parents and guardians a due controul, it directs their consent to be obtained to the marriage of infants; and though it visits with penalties such as marry in defiance of their authority, it does not render the marriage invalid; the obstacles it opposes to the rashness of youth are not a perfect barrier, but under circumstances of disgrace and punishment may be over-leapt. As the law permits infants to marry, it should seem to follow that their marriages must be accompanied with the consequences attendant on marriages in general; and this inference appears so natural, that had it not been opposed by the opinion of a learned writer, we should have rested satisfied without a more minute inquiry. Mr. Fonblanque thus expresses himself on the subject: "*As necessaries for an infant's wife are necessaries for him, he is chargeable for them unless provided before the marriage; in which case he is not chargeable, though she uses them afterwards.*"<sup>1</sup> But we hope to show that the debts of a woman contracted before marriage, either by being provided with necessaries or by other legal means, become chargeable on her husband during the coverture, notwithstanding he be an infant.

Whilst the law allows an infant to enter into marriage, it withholds none of its beneficial results; an infant husband is possessed of the same controul over his wife as a husband of full age; has the same right to her property, and enjoys all the same advantages; and she is equally under his protection and as securely withdrawn from the pursuit of creditors as the wife of an adult. Why should he not therefore be subject to all the same duties and liabilities? *Qui sentit commodum sentire*

<sup>1</sup> 1. Fonb. Treatise on Equity, 73.

*debet et onus.* If, indeed, the law had withheld from him the enjoyment of her fortune, it would have been reasonable not to have imposed on him the burthen of her debts, but as in no one respect are an infant husband's rights less than those of one of full age, his liabilities must be equally great. It is true that if a marriage is contracted between parties of whom one or both are infants, and the prescribed consent of parents and guardians is not obtained, the party actively offending in evading the law, may, if sued for that purpose, be deprived of the advantages of the property accruing from the marriage;<sup>1</sup> but this is, in its strict sense, a penalty and forfeiture for misconduct,<sup>2</sup> equally applicable to infants and adults; and cannot exonerate them from their liabilities to strangers.

The privilege of infancy is given, says Lord Mansfield, as a shield to protect his inexperience from circumvention, "and not as a sword or offensive weapon of fraud or injustice."<sup>3</sup> The wife's creditor is free from the accusation of overreaching the husband, for with him he had no dealings, and there can therefore be no occasion for the infant to be fortified against one who adopts no measures against his defencelessness. If the wife herself were an infant, necessities were properly supplied to her; and if she were of full age, the law presumes her to be fully capable of making a bargain,—and here is a sufficient protection to the husband; the full age and capacity of the wife, in the latter case, being a guarantee of the propriety of the debt, whilst the necessity of the bargain supports it in the former.

The marriage protects the wife from suits during its continuance, and vests absolutely in her husband all personalty, and such choses in action as he reduces into possession during the coverture; if, therefore, no claim lay against the husband, the creditor would, of necessity, in all such cases, be delayed in his remedy, and in many would be absolutely without redress; but can the creditor be thus injured by circumstances over which he has no controul,—is he to suffer for "*res inter alios acta*,"—is he to sustain the burden of a debt of the wife whilst her husband enjoys the benefits of the marriage? Were it so, it must be confessed that the infant had furnished

<sup>1</sup> Stat. 4 Geo. 4. c. 76, s. 23.

<sup>2</sup> 4 Russ. 329.

<sup>3</sup> 3 Burr. 1802.

himself with an offensive weapon of injustice, and that the creditor was his innocent victim.

The only authority referred to by the author, whose opinion we controvert, is a nisi prius case of Easter Term, 5 Geo. 1, the report of which is so short, that we copy it verbatim. "*Turner v. Trisby, at Guildhall. Per Pratt, C. J. Necessaries for an infant's wife are necessaries for him, but if provided in order for the marriage, he is not chargeable, though she uses them.*" Did this case in terms support the opinion for which it was cited, its being a nisi prius opinion, and extracted from a reporter of little authority, would not render it of much importance. But in fact, the ambiguous meaning of the expression "*in order for the marriage,*" induces an opinion that it was a case of fraudulent connivance by the creditor who supplied goods to the woman with the view of charging the husband to whom he knew she was about to be united.

There is, however, a decision of the Court of Common Pleas which sets the question at rest. In *Paris v. Stroud and wife*,<sup>1</sup> determined in the 18th of Geo. 2, the report of which is in these words:—

"Plaintiff made affidavit for bail, that defendants, or one of them, are indebted for board, clothes, jewels, &c. provided for the wife; defendant, the husband, an infant, moved for a common appearance. *The Court held that if an infant marries a woman of full age, (as in this case) he is liable to her debts,* but thought plaintiff's affidavit not sufficiently certain. Plaintiff had leave to make a new affidavit, and explain what was due before defendant, the wife, was of age, and what after, and whether the debt, or any part, became due before the marriage or after. Plaintiff made a new affidavit accordingly, and the sum for which bail was to be given was moderated at the Judge's chamber."

We conclude, therefore, that both principle and authority combine in fixing an infant husband with a liability, during the joint lives of himself and his wife, to answer for the lawful debts of his wife although contracted before the marriage.

S.

<sup>1</sup> Barnes, 95.

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ART. V.—POWER OF THE BENCHERS OF THE INNS OF COURT.  
MR. WHITTLE HARVEY'S MOTIONS.

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Most of our readers must have noticed with some interest and curiosity the recent motion of Mr. Harvey for bringing in "A Bill to give power to the Court of King's Bench, in certain cases, to compel the Benchers of the four Inns of Court to admit parties as students and also barristers at law." Having failed to convince the house of its expediency, he has since announced that he will move an address to his Majesty to direct the Common Law Commissioners to examine into the powers now exercised by the Benchers of the Inns of Court with respect to the admission of barristers. It is possible that parliament may be called upon to decide on the latter motion before these remarks appear in print; but as, whatever the result, they would not be much modified thereby, we have thought it better not to delay making them. It is no part of our present object to investigate the circumstances of Mr. Harvey's own case, or to decide whether the quarter from which the motion came, and the illustrations by which it was supported, were favourable or not to its success. It is sufficient for us that a very strong minority of the House of Commons adopted the mover's view of this really important question, and urged in his behalf some arguments entitled to grave attention. But before entering into these, it may be as well to state precisely what this obnoxious power of the benchers is, both in the case of students and of barristers.

In the former, then, it amounts to rejecting at their pleasure any applicant for admission to their societies without inquiry instituted, without cause assigned, and without appeal allowed, and is therefore a power purely absolute and irresponsible: in the latter, the same with one important difference,—that an appeal lies to the common law judges, and thereupon, though not before, the benchers may be compelled to assign reasons for their refusal to call to the bar. These large privileges are no modern usurpation, but seem coeval, or nearly so, with the first establishment of the Inns of Court. The evidences for their antiquity in the shape of kings', judges', and benchers' orders,

may be found scattered up and down in "*Dugdale's Origines Juridiciales*,"<sup>1</sup> or more commodiously collected in the "*History and Antiquities of the four Inns of Court*." Equally ancient and well-established seems the authority of the judges as visitors, for reviewing the general discipline and regulation of the members of these societies. In one particular, indeed, viz. a control over the admission of students, this authority seems to have been more extensive formerly than at present. This we gather more especially from an order of the judges, 1 James I., adopted by the benchers of the four Inns, that none but gentlemen should thereafter be admitted members. Such an interference seems to militate against the above statement of an irresponsible power of rejection residing in the benchers, and to throw a doubt upon its accuracy; but this doubt has been removed by the recent case of *Wooler*,<sup>2</sup> who applied, when refused admittance as a student, to the judges to interfere, and received for answer that they had no power to do so, and, on his subsequent application for a mandamus to the King's Bench, the whole Court expressed a clear opinion, that there was not, nor could be, from the nature of the case, any control there or elsewhere over the independence of the benchers in admitting and rejecting as it pleased them. The arguments adduced for the reasonableness of such an independence, we shall presently have occasion to notice.

It seems hardly disputable that there is good reason to desire a restraint of some sort, placed in fit hands, on the admission of barristers and students. In a profession like the law, where the confidences reposed are so important, the temptations to dishonesty and meanness so powerful, the exercise of independence and liberality so requisite, few, it is presumed, will contend that it would not be greatly for the benefit of society, if the practice were confined to men of good character and generous feelings. Fewer still will be found to support the removal of all restrictions on the ground taken up by Mr. O'Connell, that if disreputable persons be called to the bar, the public suffers nothing, the public not being compelled to employ them; seeing how little in general the client knows of the counsel he employs: or on his other ground,

<sup>1</sup> Especially at pp. 141, 147, 191, 274, 311, 317.

<sup>2</sup> 4 B. and C. 855.



that the profession suffers nothing, not being compelled to associate with them; seeing how constant and close is the collision of the Court and the circuit-table.<sup>1</sup> If there be any well-judging persons who wish to have the avenues of law thrown absolutely open to all comers, it must be, we imagine, because they entertain an opinion, that, in whatever hands the controlling power were lodged, it could not be employed otherwise than ineffectively or unjustly. We see no reason why this should of necessity occur, and wish to see the experiment tried fairly: at any rate, the arguments of weight employed in the late discussion go against the operation, not the nature, of the restrictions of the Inns of Court, and aim at showing that their administration is placed in unfit hands, not that it should not be placed somewhere. Neither do Mr. Harvey and his advocates complain that the authority of the benchers has been too frequently or extensively exercised, but only that it has been unjust and partial in the selection of objects for its exertion. It would, indeed, be extravagant to assert, viewing the present state of the English bar, that an over-watchful or too severe eye had scrutinized the character of every candidate for admission. Let us, then, for the present, confine ourselves to inquiring whether in any and in what respects the present system is objectionable, and what are the improvements to be made in it.

Mr. Harvey introduced his motion with the following remarks:—"Every man who merits the distinction of being a constitutional lawyer must be a willing supporter of this measure, for it is founded on principles of which the ablest of their order have been the most eloquent defenders. These principles are two, and they are the foundation of every law that claims an alliance with moral justice. 1st. That there can be no wrong without a remedy, or, what is the same thing, no right without the means of adequate vindication: secondly, there can be no punishment, however slight, which is not preceded by a verdict pronounced by the peers of the accused, under the sentence of a responsible jury,

<sup>1</sup> As to the evil consequences resulting to the community at large from the degradation of the legal profession, see *L. M.* vol. v. pp. 34 and 61. We need hardly add, that if men of low character are indiscriminately admitted, it will be soon abandoned by those to whom its present rank in society is attributable.—*Edit.*

agreeably to known and defined laws." To say that for every right there should be means of adequate vindication, is a nearly identical proposition, for without those means, a right could not, from its nature, exist; and just so long as the benchers or other persons exercise a control over calls and admissions, just so long will persons of indifferent character have no *right* to become barristers or students when they desire it, and no longer. But Mr. Harvey's second hypothesis is too extravagant to require combating, although it forms the basis of a great portion of his subsequent reasonings. It was well said in reply by the Attorney General, (and he said but little well on this occasion) that the fact of having no specific charge against a man fit to lay before a jury, does not prove him a proper person to admit to your society, or to entrust with your affairs. So far we quite agree; but we fail to perceive the inference, that, because there may be questions of character beyond the province of a jury, the right tribunal for deciding on them is a secret and irresponsible body, which assigns no reasons for its conduct. Still less do we understand the analogy of colleges quoted by the Attorney-General in the late debate, and by the judges in Wooller's case, where it is contended that the Inns of Court, in rejecting whom they please from their society, do no more than the English Universities, which have never been attacked on that account. Had Oxford and Cambridge a monopoly of education, as the four Inns have a monopoly of law; were the former even institutions for the national benefit, as the latter must be taken to be, there might be some force in this analogy. But a man may be learned, and make good profit of his learning, and yet not a bachelor of arts, and the colleges of England were intended not so much for the good of the public, as for the maintenance of the religion paramount for the time being.

We might go on adducing some further instances of fallacies employed on both sides in the late discussion, but, to avoid prolixity, let us proceed at once to state what seem to be the main objections to that which Mr. Harvey, with more magniloquence than taste, denounces as "that unheard-of and tremendous power with which these cloistered benchers arm themselves—a power which monarchy itself cannot exer-

cise, and totally opposed to every principle of common sense, justice, or honesty; an inquisitorial authority coextensive with a man's being, exercising jurisdiction from the hour of his birth to the day that they strangle him." As the cases of student and barrister in some respects are different, it will be as well to take, first, those objections which apply to both.

These are, first, the extreme uncertainty of the grounds on which the benchers refuse to admit or call to the bar. Do these gentlemen exclude only those who have been guilty of legal offences, or do they extend their scrutiny to moral, or, farther, to political conduct? Have they any fixed line of demarcation to separate the elect from the condemned? It no where appears that they have. A few vague rules they have sometimes promulgated, but not regularly followed. They have a regulation against low birth and poverty still extant on their order-books, but it has long become a dead letter. One Inn made a law against reporters for the public press, another Inn objected to insolvent debtors, but the latter has admitted insolvent debtors, and the former called reporters to the bar.<sup>1</sup> As the practice stands at present, it is so uncertain, that some unlucky persons must be equally liable to false hopes of obtaining admission and false fears of suffering rejection. It is, perhaps, not too much to say, that any man whose private

<sup>1</sup> Arthur Murphy, the translator of Tacitus, was refused on the ground of his having once been upon the stage. He proved himself to be a man of education and fair descent, and offered the clearest evidence that he had only followed the dramatic profession for a very short time either as a frolic or under the pressure of temporary distress, we now forget which; but the benchers were inexorable. We give this anecdote on the authority of one of his relations, an English barrister, now living. One of the most eminent men now at the bar is well known to have met with considerable opposition on the part of the benchers of Lincoln's Inn, in consequence of his having once moved in an inferior walk of life; and we are assured that rejections were formerly very frequent; but rejected persons are naturally unwilling to make their cases public. Some notion may be formed of the kind of power exercised by the benchers of the olden time from the following extract from an order made by the benchers of the Middle Temple in 1636:—"Neither do they intend to call any one to the barr hereafter, other than such as have their full time and are otherwise qualified thereunto, as the orders of the House do require: and therefore they enjoin the gentlemen under the barr to apply and follow their studies to keep the case, to perform their exercises, to order their habits and hair to decency and formality, according to the orders of the House; and to yield due respect and observance to the benchers and ancients, their governors, as they expect and desire the preferment to the degree of the barr, or otherwise care to be liable to the censure of the bench; or (as the cause shall require) to be cut off from the society."—*Edit.*

character had been aspersed, though falsely, or whose political conduct had been very obnoxious to the ruling party, might run a risk, on applying to be called or admitted, of having that application rejected, and so of incurring an irremediable disgrace. We confess that Wooller's case appears to us a hard one. On that occasion the benchers of Lincoln's Inn exercised their odious prerogative of assigning no reason for their refusal; but the Attorney-General stated the other night, that "he did not know whether the opinion was a right one, but he did know that Wooller was excluded because the benchers thought that the 'Black Dwarf' was a composition exciting to deeds of violence, tumult, and sedition." Yet when some of the most offensive passages of that publication were selected for prosecution, the defendant was acquitted by a jury, and besides, as Mr. O'Connell remarks, libel is too dubious an offence to make it a proper cause for exclusion; the nature of it varies with the temper of the times, and before now, to call Lord Redesdale a stout-built special pleader, or Lord Hardwicke a sheep-feeder from Cambridge, has been accounted libellous. We give the examples solely on the learned gentleman's authority.<sup>1</sup>

The next objection of weight is the imperfect information upon which the benchers generally act, and the consequent injustice that is done. This is an evil manifold in nature, and may appear in various ways. It may lead to the exclusion of the deserving through an *ex parte* statement which has been taken up without a contradiction being permitted, or to the admission of the undeserving from no statement having been received and no inquiry made. If it be doubted whether the authority we are discussing has ever been the means of shutting out from the profession any person really a desirable acquisition to it, it can scarcely be contended that some individuals have not successfully wriggled through the probationary ordeal from the ignorance or negligence of the benchers, whose private life, if known, would have subjected them to banishment from any society of gentlemen whatever. It is said too, that in some inns a more lax morality prevails than

<sup>1</sup> Mr. O'Connell also stated, that the time has been in Ireland when he could get a jury to find the Lord's Prayer libellous by the aid of proper innuendoes.—*Edit.*

in others, and that individuals, not remarkable for the immaculate virtue of their earlier life, have found a more lenient censorship on one side of Fleet-street than on the other.

Another objection should be noticed that attaches equally to all tribunals, which, exercising a controul over the destinies of any portion of mankind, keep their proceedings and the reasons of them a secret. Without casting the slightest imputation on the characters of the Benchers of the four inns, of whom we do not know that one exists who is not an honourable and honest man, it is yet incontrovertibly true that their unpublished and unexplained decisions, put it in the power of any malignant or prejudiced individual to inflict an irreparable injury on a person undeserving of it. Should an unlucky candidate chance to have one enemy among the ruling body, he may be overwhelmed and crushed by accusations, which he is not permitted an opportunity of answering. On the other hand, should a person steeped in infamy possess one friend in authority, inquiry is escaped under the shade of his protection, and degradation to the profession, and injury to the public, are the almost inevitable consequences.

There is a fourth objection of great weight, but applicable to the case of students only,—we mean the irresponsibility of the power which regulates their admission. The mention of the fact sufficiently points out the evil, without consuming any time in proving the all but universally admitted proposition, that irresponsible authority is in all cases liable to much abuse, and that a court from which lies no appeal, is less likely to take care that its decisions are accurately just, than one placed in a less independent position. Mr. Campbell, although a friend to the present system generally, expressed his regret during the late debate, that the judges did not possess the same controul over the benchers in the case of students as of barristers. The fact of their lordships once possessing it, and their subsequent unaccountable and voluntary disclaimer of it, have been already mentioned.

Having stated what appear to be the main evils of the present system, it remains to point out some obvious and simple remedies. As a preliminary, saving much trouble and more injustice, we think it would be well for the four inns to make an absolute rule, that no objection should be allowed to the

call of any member to the bar, unless for misconduct subsequent to his admission as a student. By this would be avoided the needless cruelty of suffering individuals to devote much time and money to the pursuit of a profession which they are, after all, forbidden to enter. The benchers themselves, too, would thus escape the somewhat ludicrous appearance of affixing a dishonourable stigma on persons they had previously recognized as good enough for their society. Let then the inquiry into previous conduct be entered into solely at the period of admission to the inn, with the exception above mentioned; and further let this inquiry be subject in all cases to revision by the judges on appeal; not by way of mandamus, which, as has been truly said, might bring questions before a jury unfit for their decision, but let the judges act as visitors or arbitrators, hearing the statements on both sides, receiving such kind and quantity of evidence as they think fit, and finally deciding, when a sufficient case appears made out, on one side or the other. It appears to us that of all courts of appeal capable of examining such questions, this would prove the most dispassionate and just. Mr. Harvey, however, would have us to understand that such was not the fact in his own case. "The question," says he, "with the benchers being the existence of a certain document,<sup>1</sup> I offered to produce the person who drew the instrument, another person who copied it, two persons who witnessed it, the individual who signed it, the person who sold the stamp for it, and thirteen distinct and impartial persons who had seen it,—and yet is the House prepared to hear what I am about to state? The hall in which

<sup>1</sup> One of the main charges against Mr. Harvey was, that being employed to sell an estate as an attorney, he had really sold it for 1,450*l.*, but had only accounted as on a sale for 950*l.* to the vendor. His answer was, that he had entered into a prior agreement with the proprietor to give 950*l.* for the property, and that the 500*l.* in dispute was his own fair profit on the bargain. He was unable to prove this agreement (which he says was in writing, and attested by two witnesses,) at the trial of the action brought against him by the proprietor, who recovered the 500*l.*; nor did he produce it on the inquiry before the Benchers. He simply averred that he had exhibited it in the interim to sundry persons, and, amongst others, to some members of the Common Council of Bishopsgate-Within or Without, whom the Benchers did not appear to think the best possible judges of the authenticity of legal instruments. On being called on to account for its non-production, Mr. Harvey exclaims: "What possible use could I suppose their preservation (of the agreement above-mentioned and another) could ever be to me, nine years after they had been carried into effect?"

these learned visitors, the twelve judges, assembled was crowded, as were all its avenues, with barristers, solicitors, witnesses and friends. The short-hand writer was there also; and what were the first words pronounced by the Chief Justice on taking his seat? Every person in this hall, except the parties concerned, must immediately leave it, for this is not a court of justice." He thence goes on to infer that his case was unfairly dealt with, but we see only in his statement that publicity was forbidden to the proceedings. It does not appear very material whether such inquiries are made public or not. It would, perhaps, be more consistent with the general spirit of our institutions that they should be so.

Having now pointed out what seems the desirable form of scrutiny into the merits of candidates for admission, let us add a few remarks on its nature. We wish to see it, instead of being nominal and lax, as at present in most cases, real and rigid in all. The methods for facilitating this would be but few and simple. Let, for instance, the names of those applying to be admitted as students be placed in some conspicuous position in the hall of the inn for one term, as is sometimes done with those of candidates for the bar at present. This would give publicity and opportunity to those who knew the claimant to be unworthy, of taking means to prevent his entrance. Let all applicants be required to produce testimonials of previous good conduct, as it is at present the usage with those who seek admission to holy orders. A fair character seems as important in a lawyer as a clergyman. Further, much trouble and disappointment would be saved by the benchers framing, with the concurrence and approbation of the judges, certain fixed and invariable rules of exclusion; not intended to include all cases, but absolute as far as they went; such for instance as these, that no person guilty of a criminal offence,—no one proved to have been culpably involved in

(Letter to the Burgesses of Colchester, &c. p. 44.) Bearing in mind that this alleged conviction of the inutility of these documents is supposed to have led to their loss *after* the action, and *after* their production to the Common Councilmen, we will ask Mr. Harvey one question in our turn—Does he believe that there is one man woman or child in these realms that would be convinced by such reasoning? The other charge was, that he had stolen a deed; which charge also, as appears by his own letter, the verdict of a jury confirmed.—*Edm.*

one of those transactions, which Mr. Harvey terms mere questions of *meum* and *tuum*, but some people denominate fraud,—no one, if it were thought fitting, who had been a bankrupt or insolvent debtor, should be admitted a member of any inn of court. Such regulations would materially diminish the number of applicants for admission whom the society might feel called on to reject, and so lighten their labours of inquiry. If it be objected that the system we are advocating would make the situation of a benchers laborious and uncomfortable, we confess that, viewing the agreeable and honourable position those gentlemen occupy, (many from the merit of age only,) and remembering that a good portion of them have retired from professional occupations and lead a life of ease and idleness, we should not object to see them thus usefully though unpleasantly employed, in improving the state of legal society.

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#### ART VI.—RECENT EDITIONS OF BLACKSTONE'S COMMENTARIES.

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*Commentaries on the Laws of England, in four books, by Sir Wm. Blackstone, Knt. Sixteenth Edition, with Notes. By John Taylor Coleridge, Esq. Barrister at Law.*

*Commentaries on the Laws of England, by the late Sir Wm. Blackstone, Knt. A new edition, with practical Notes. By Joseph Chitty, Esq. Barrister at Law.*

*Commentaries on the Laws of England, with an Analysis of the Work, by Sir Wm. Blackstone, Knt. Eighteenth Edition, with the last Corrections of the Author, and copious Notes. Vols. I. and III., by Thomas Lee, Esq. of Gray's Inn; Vol. II. by John Eykyn Hovenden, Esq. of Gray's Inn; and Vol. IV. by Archer Ryland, Esq. of Gray's Inn. 1829.*

THE Commentaries of Sir Wm. Blackstone, notwithstanding many important alterations which have been made in different parts of the law since the time he wrote, is still the best work to which the professional student can be directed in the outset of his studies, and the only one from which the



general reader can derive a knowledge of the laws and institutions of his country. It is not surprising, then, that as new editions have been required, several gentlemen have thought it a worthy occupation to endeavour to improve and supply the defects of such a work. "To me," Mr. Coleridge well observes in his preface, "the Commentaries appear in the light of a national property, which all should be anxious to improve to the uttermost, and which no one of proper feeling will meddle with inconsiderately. It is easy to point out their faults; and their general merit of lucid order, sound and clear exposition, and a style almost faultless in its kind, are also easily perceived and universally acknowledged; but it requires the study, perhaps necessarily imposed upon an editor, to understand fully the whole extent of praise to which the author is entitled; his materials should be seen in their crude and scattered state; the controversies examined of which the sum only is shortly given; what he has rejected; what he has forborne to say, should be known before his learning, judgment, taste, and above all, his total want of self display, can be justly appreciated."

To the correctness of this eulogium, the examination which we have, from time to time, made of portions of the materials whence the learned commentator has drawn his statement bears ample testimony.<sup>1</sup> We think it, therefore, a question of no slight interest how this valuable work has been handled by its editors, whether its defects, which have chiefly originated in alterations of the law, have been judiciously supplied.

In order that we may estimate fairly the labours of the gentlemen whose works stand at the head of our article, we should consider the nature of the "Commentaries," and for whose use they are intended. And it requires but very slight consideration to see that it was the object of the commentator, rather to seize upon general principles than to enumerate all the minute details of each particular case. But there is more detail than might have been expected; this however is confined to the citing of the exceptions from general rules, and the examples by which such rules are illustrated or explained.

<sup>1</sup> A very different, and very powerfully expressed, opinion of the Commentaries is given by Mr. Austin. (*Outline annexed to his work, p. lxiii.*)—Edit.

We do not find, and it is not the object of the work that we should, all the details required by the practitioner in advising upon the "rights" of persons or in assigning the appropriate remedy for their "wrongs." Such is the nature of the work, and, general as it may be, the class of persons to which it is applicable is not less extensive. It is truly stated by Mr. Coleridge, "The Commentaries are in the hands of the most different descriptions of readers; they are referred to by the lawyer, studied by the pupil, consulted by the country gentleman, and each will expect from the editor the subsidiary information which he happens to need at the moment." But we apprehend the task of the editor was sufficiently defined by the *nature* of the work. It was his duty to correct the original oversights of his author, and to notice those alterations of the law since his time, which affect the statements in the text.

In general, Mr. Coleridge has performed his task diligently and well. His notes, written in a perspicuous style, evince considerable acquaintance with the historical learning connected with the subject, and frequently show that he has carefully considered the materials whence Sir William Blackstone has drawn his luminous statements. The student need not refrain from reading the notes, from the apprehension that they will divert his attention and lead him far beyond the text; he will find in them what is necessary for the right understanding of the text, and no more. The editor has judiciously confined himself to the correction of original oversights, and such additions as the alterations of the law required; and his notes may be said to supply such information as the author himself would have approved had he revised his work at the present time.

When we consider the variety of topics comprised in the Commentaries, we are well able to estimate the forbearance of Mr. Coleridge, in omitting many opportunities of showing his ingenuity and learning by dilating upon topics which would have afforded him an easy conquest, but which were only brought forward by the commentator incidentally, and were not necessary for his argument. Much of the labour of Mr. Coleridge is indeed hidden from the observation of the careless reader; his corrections of the text and his verification

of references have added much to the value of the work, without increasing its bulk or expense. He also deserves praise for the manner in which he has treated the labours of his predecessors; he has silently omitted their notes when incorrect or irrelevant, without proving to his readers that they were wrong. "The art of writing notes," says Johnson, in his admirable preface to Shakspeare, "is not of difficult attainment. The work is performed, first by railing at the stupidity, negligence, ignorance, and asinine tastelessness of the former editors, and showing, from all that goes before and all that follows, the inelegance and absurdity of the old reading; then by proposing something which, to superficial readers, would seem specious, but which the editor rejects with indignation; then by producing the true reading, with a long paraphrase, and concluding with loud acclamations on the discovery, and a sober wish for the advancement and prosperity of genuine criticism."

We will now extract a few of Mr. Coleridge's notes, selecting those which will be most generally interesting.

The learned commentator, it is well known, lays down the position that it is not a moral offence or sin to transgress a law which merely enjoins or forbids a thing which is wholly a matter of indifference; and he notices the game laws and some others as falling within his rule. Conscience, he says, in such a case, is no further concerned than by directing a submission to the penalty in case of our breach of such laws. "But," he adds by way of qualification, "where disobedience to the law involves in it *any degree of public mischief or private injury*, there it falls within our former distinction, and is also an offence against conscience." Upon this doctrine Mr. Coleridge makes the following sensible remarks:

"Penalty, of whatever kind, is only another name for punishment; and punishment, as the author himself tells us in vol. iv. p. 11, is not imposed for the sake of atonement or expiation, but as a precaution against future offences. The amount of the penalty may indicate the importance which the legislature attaches to the crime, and so indirectly the public inconvenience of the breach of the law, but it can never be calculated to heal the wound occasioned by the breach.

"Nor have the wisdom or importance of the law any thing

to do with the principle of our obedience to it; the true principle of that is the authority of the lawgiver, which must be the same whatever be the law. If we are convinced that the authority is sufficient, we ought to obey equally in great and small; nothing will discharge us but the opposition of a superior authority, which, in truth, renders the inferior insufficient. The same principle, upon which a breach of one commandment is declared to make a man guilty of the whole ten, applies in this case, and the more closely the more trivial the matter may seem; for the smaller the inducement is upon which we break the commandment, the greater is the contempt of authority.

“ Common sense and experience approve this reasoning, by showing that nothing is, in fact, indifferent when the law has once prohibited it. The breach of any one law must be inconvenient, either by way of example to other persons, or as diminishing the habit of respect for other laws in ourselves. The laws of a country form an entire connected body, and though he that takes a little piece of iron from an iron forge *may* do no great harm, yet if he takes it from a lock or a chain he disorders the whole contexture.

“ One argument of the author for the position in the text remains to be noticed, because it is of a very plausible nature. Jeremy Taylor has stated it, and given an answer rather too abstruse and scholastic for this place. The objection is, that if human laws bind the conscience, then it is in the power of human legislature to multiply crime; in Taylor's own language, then man shall have power to make more ways to the devil, to make the straight way to heaven yet straighter, and the way to hell, which is already broad enough, yet wider and more receptive of miserable and perishing souls.

“ I cannot see how, on principles of justice, this differs at all from the conceded power of binding the conscience to the payment of penalties, or how a compulsory payment of them, when incurred, can discharge the conscience; and it cannot seriously be maintained that the law is made on a theory of voluntary payment of the penalty. It can never have been supposed that the man who smuggles to avoid paying the duty, intends to pay, except on compulsion, the treble value of the article, or a penalty of £100.

"But if we pass over this inconsistency in the text, and admit the argument in its fullest extent, it is undoubtedly strong to show the inconvenience of an unnecessary law, and the heavy responsibility under which any law is made. But it can go no further, if the principles laid down in the beginning of this note are true. It should be remembered, too, that this is not the only instance, indeed that the instances are not few, in which human powers are allowed to act indirectly on the consciences of men. And as, in a question of convenience, it is always allowable to strike a general balance, it may be said that a less evil flows from this indirect consequence of some laws, which consequence it is always in the power of the subject to avoid, than good from the vast addition of strength thereby given to the sanction of human legislators in general."—vol. i. pp. 58, 59.

We will contrast with these observations Mr. Lee's note on the same subject, from which some idea may be formed whether he is likely to prove a safe and an intelligent instructor of youth.

"Happily for the due administration of the laws, whatsoever they be, disputation as to whether the observance of them be matter of conscience, is very immaterial. If the severe execution of laws be insufficient to operate restraint, conscience will hardly usefully interfere. I cannot differ from the conclusion at which the commentator here arrives, namely, that when the penalty of violation is paid, the conscience is absolved. Where may conscience, as to obeying or disobeying the law prohibiting the manufacturing of glass or of soap, be exercised? and, if the dictates of conscience may scarcely find place as to *such* laws, what are those to which, as mere human laws, it is? Feeling refines too much, as well as too uselessly, when it seeks to assimilate conscience with things so purely indifferent to the good of society, in a moral point of view, as the municipal law of society in many cases is.

"It is not difficult to distinguish mere man in his social, from man in his unsocial, state. As in a social state we behold him a being remarkably circumscribed as to every natural power he possesses the inherent faculty of exerting, had such faculty its full scope. He may neither love nor hate, succour nor avenge, where if left to himself, independently of social

restraint, he might have done. Circumscribed by power, his very morals are lined out for him; he has them to learn, and to forget; his wiliness, strength, and ingenuity, whether passion or reason give them energy or motive, must be modified; not self-directed, or otherwise, than as society wills and directs. If this be true, and such the commentator may be presumed to have intended it is, where is man's conscience; that connate monitor, as I understand the word conscience, which gives the knowledge of good and evil to a being who has little other rule of good and evil but his own estimation of what is good for himself and evil for himself. To assert, therefore, that obedience to laws is matter of conscience, is to assert that man is born with a conscience alive to all and every absurd or foolish or wicked law that legislators, that is to say, men having the power, no matter where or how gotten, to restrain their fellow-men from doing that, or to command them to do this, may choose to enact. And, if conscientious obedience may not be predicated of all law, I am yet ignorant why it should be predicated of any law merely human."—vol. i. p. 57, note 18.

We trust none of our readers will be perplexed by Mr. Lee's notions with respect to conscience; but we will add a few remarks on the subject.

Conscience is the moral feeling of a man with respect to his actions; whether a man's actions be right or wrong in his own estimation depends upon his judgment; thus conscience depends upon judgment. The judgment of a man consists of his reason or mind, and his information or knowledge—as the knowledge of a law which his reason considers of binding authority: thus, again, conscience depends upon a man's knowledge. If a man's moral feeling is filled with approbation and delight after an action has been tried by his judgment, he is said to have a clear and good conscience: so, if a man is filled with remorse and regret after any of his actions have been so tried, he is said to have a guilty conscience. But a man may on such an occasion neither feel self-approbation nor remorse; and then, and it is a fearful state, his conscience is seared and dead. Thus conscience where it exists, and it exists in every breast until extinguished by repeated opposition and neglect, punishes the transgressor of a law,

and rewards the obedient. "And therefore," to use the words of the eloquent Jeremy Taylor, "conscience is called the household guardian, the domestic god, the spirit or angel of the place; and when we call God to witness, we only mean that our conscience is right, and that God, and God's vicar, our conscience, knows it."—*Rule of Conscience*, b. i. ch. i.

Whether, then, any particular action be against my conscience, depends upon the verdict my judgment passes upon such action—depends upon what rule or law respecting such action is known to my reason or mind. May I smuggle goods if I am ready, on discovery, to pay the penalty? This depends on two questions:—1. Are the revenue laws binding on me? 2. Do they give an option either to obey or pay the penalty? It is quite clear that revenue and all municipal laws, not contrary to the law of God, are binding on the subject. It is equally clear they do not give an option; the penalty is not intended to be a substitute for the performance of their requirements, but is the best means the legislature can devise to prevent the infraction of its commands. Hence it follows, that the municipal laws in question cannot be safely broken on the ground that we are ready, if called upon, to pay the penalty. And, notwithstanding Mr. Thomas Lee, we venture to say, happy is it for the state and society that the observance of the laws is a matter of conscience. "The voice within, which approves or disapproves, has in it a restraining force more powerful than a thousand gibbets."

It has, Mr. Coleridge observes, been often argued or assumed that the king cannot constitutionally reject a bill which has passed both houses of parliament. This error arises from not considering that the constitution of this country invests the king with two characters which are perfectly distinct. He is the appointed minister to enforce the laws enacted by the legislature, or, in other words, the head of the executive; but he is also a member, and an integral part of the legislature.

"The constitutional notion of an English king involves, I conceive, both characters, and keeps them distinct; as head of the executive, he is minister of the supreme power, and can neither dispense with laws, nor refuse to obey them; as a member of the legislature, he is as free, absolute, and irre-

responsible as either of the other two estates; in the former capacity his ministers are subordinate servants, and take upon themselves that personal responsibility for his acts or omissions, which, by reason of the sacredness of his person, cannot attach on himself; in the latter he has and can have no responsible ministers, for the responsibility of his acts is absolute, and attaches to the character in which they are done (that of a member of the supreme power), and not to his person."—vol. i. p. 474.

The following passage from Fortescue, Mr. Coleridge remarks, p. 276, presents a curious contrast to the usages of the present times :

" Furthermore I would ye should know, (addressing Prince Edward, son of Henry VI.) that the justices of England sit not in the king's courts above three hours in the day, that is to say, from eight of the clock in the forenoone till eleven compleat; for in the afternoones these courts are not holden or kept. But the suitors then resort to the perusing of their writings, and elsewhere consulting with the serjeants at law and others their counsellours. Wherefore the justices after they have taken their refection, do pass and bestow all the residue of the day in the study of the laws, in reading of holy Scripture, and using other kind of contemplation at their pleasure, so that their life may seem more contemplative than active."—*De Laud.* c. 51.

But notwithstanding they indulged so freely in contemplation, and although their salaries were extremely low, the judges were men of great wealth.

" Of this there are abundant proofs: I will mention one. In a capitation-tax granted to Richard II. I find archbishops, and the dukes of Lancaster and Bretagne (especially), rated at £6: 13s. 4d.; earls and bishops at £4; barons at £2; and the judges and chief baron at £5; and serjeants and great apprentices of the law at £2."—*Rot. Par.* III. 56, 57, 58, cited in Lingard, *Hist.* IV. 231.

This is certainly not the case now; so that we apprehend, did the sovereign wish to replenish his exchequer, a prosecution of the judges for the sake of their fines, as is insinuated of Edward I. by Blackstone, would be the last expedient resorted to. Indeed, notwithstanding the late increase of their



salaries, many of the "great apprentices of the law" enjoy larger incomes.

We were not before aware that any of our sovereigns hoped that the philosopher's stone would be added to the numerous discoveries by which this country is distinguished; but we find that Henry VI. granted a patent to John Faceby and others "*ad investigandum prosequendum et perficiendum quandam preciosissimam medicinam quintam essentiam lapidem philosophorum nuncupatum necnon potestatem faciendi et exercendi transmutationes metallorum in verum aurum et argentum.*" And in the reign of Edward VI. there is a case of a man's confessing himself guilty of multiplication, and of using *red wine* and other things necessary for the art.

It is now time to refer to the labours of Mr. Chitty. His notes he has styled "Practical," and in his preface he says: "It is attempted in the present edition to render Blackstone's Commentaries a work of PRACTICAL utility and convenient reference to the profession in their daily avocations." Accordingly we find the notes on many subjects enter much into detail, and contain a great deal of learning purely technical. This of course renders the work quite unfit for the student or general reader; for *his* progress would necessarily be hindered by notes which contain much which it is unnecessary for him to know—much which he could not understand. We need not say that we think Mr. Chitty has mistaken the kind of notes which should attend the Commentaries; and when we consider the great number of subjects comprised in the Commentaries, we think it would be extremely difficult to accomplish what he has attempted. To make it a complete book of reference for the practitioner upon every subject to which it refers, would require notes ten times more voluminous than the work itself. They should comprise, in fact, all the practical treatises with which our law abounds; this shows the impracticability of what Mr. Chitty has attempted. Neither do we altogether approve of the manner in which he has executed his plan. Many of the notes we have examined are more calculated to mislead than assist the practitioner; and we have found notes which have nothing to do with the text,<sup>1</sup>

<sup>1</sup> See note 35, vol. ii. p. 35, to Blackstone's definition of a private right of way. Mr. Chitty appends a long note on highways, and on the law in general respecting

and references which have no connection with the notes to which they are attached.<sup>1</sup> It would lead us into discussions requiring more space than we can now afford, were we to justify our censure by examining the book in detail; but in addition to the notes already cited, we confidently refer the professional reader to those mentioned in the note below;<sup>2</sup> and we must observe, it comprehends the greater number of those we have examined.

We think we perceive in some of Mr. Chitty's notes, that he has occasionally availed himself of Mr. Coleridge's labours, and without any sufficient acknowledgment; unless, indeed, the following passage, extracted from the preface, be thought sufficient:—"It may be observed, that the circumstance of the present (edition) being the last executed, has presented *some advantages* to the editor, which he trusts it will be found he has not neglected to improve." (p. iv.) There seems to us rather a remarkable coincidence between the following passages:

*Mr. Coleridge's note*, vol. ii. p. 52.

"A satisfactory derivation of this word (*vasal*) has long been wanting, which is entirely omitted in Spelman's 'Glossary.' Meyer suggests one, which is at least plausible. The word 'gesell,' he says, in Dutch and German, signifies 'companion.' Tacitus, we know, has described the first rude appearances of the relation of lord and *vasal* under the notion of companionship; but his terms *comites* and *comitatus* were necessarily abandoned

*Mr. Chitty's note in loc.*

"Spelman's 'Glossary' does not give the derivation of the word *vasal*; nor is it stated with certainty by any other author. Perhaps the most plausible etymology is that suggested by Meyer, who says the word 'gesel,' in Dutch and German, signifies 'companion.' And Tacitus, whose 'De Moribus Germanorum' may be looked to for information on this point, describes the first indications of the relation of lord and *vasal* under

ways. See also note 51, vol. ii. p. 42; also note 60 in p. 335 of the same volume; where Mr. Chitty, to the text which concerns the construction of the Statute of Uses, has a note of two pages and a half, detailing a number of cases arising upon *Wills*, respecting the question whether trustees took the legal estate. See latter part of note 3, vol. iii. p. 24.

<sup>1</sup> See reference to Act of Philip & Mary, and to 2 Strange, in note 3, vol. i. p. 460. Also reference to 3 Madd. in note 73, vol. ii. p. 343.

<sup>2</sup> Vol. i. p. 442, note 43. Ibid. p. 464, note 16. Ibid. p. 466, note 25.

Vol. ii. p. 18, note 5. Ibid. p. 122, note 4. Ibid. p. 138, note 34. Ibid. p. 150, note 14. Ibid. p. 159, note 7. Ibid. p. 201, note 3. Ibid. p. 297, note 7. Ibid. p. 297, note 8. Ibid. p. 351, note 8. Ibid. p. 418, note 13.

Vol. iii. p. 94, note 18. Ibid. p. 199, note 2. Ibid. p. 293, note 1. Ibid. p. 303, note 33. Ibid. p. 306 (a), note 40. Ibid. p. 426, note 1.

for this purpose when they became applied, which was very early, to designate public officers and public charges, the governors of districts, and the districts themselves. But it is obvious that these must have been secondary meanings, that before *comes* signified a count, or *comitatus* a county, they must have signified companion and companionhood; and we know that the first counts were what we should now call vassals of the monarch. When, however, the secondary meaning superseded the first, it seems not improbable that the original term might be latinized into *guasallus* or *vasallus*."—*Esprit, Origine, et Progrès des Institutions Judiciaires*, vol. i. p. 144.

the notion of companionship. His terms *comites* and *comitatus* before they meant, the first a count, and the second a county, must have signified companion and companionhood; and it is not disputed that the first counts were what may be called vassals of the king. When, however, these words were no longer used to express their original meaning, 'gesell' might become latinized into *guasallus* or *vasallus*."—See *Esprit, Origine, et Progrès des Institutions Judiciaires*, vol. i. p. 144.

It is with great regret that we speak disparagingly of any labours of Mr. Chitty, who perhaps has done more than any man now living to facilitate the study of law, and always shows great learning and ability, though too often neutralized by haste. We admit, too, that few men are entitled to assume a higher tone than himself, but we cannot help thinking that, considering the small attention this edition evidently received at his hands, the tone of the following passage of his preface is a little too high:—"It has been said that this work (the Commentaries), for a single production, is the most valuable which has ever been furnished to the public by the labour of any individual; and in assenting to the truth of this proposition, the editor is unconscious of any sinister appropriation of any portion of this praise to himself, should it be reiterated after the publication of the present edition; but it would be a perfectly gratuitous affectation of humility were he to conceal his conviction, that, if former editions justified this measure of commendation, the present has equal, if not higher, pretensions to this distinction." Truly this humility is scarcely inferior to that of the eminent conveyancer, who sometimes kindly endeavours to instil into the minds of his Majesty's justices of the Court of King's Bench correct principles respecting the laws of real property, and who once gravely informed those learned personages, that, except himself and one or two

others, there were none amongst his brethren upon whom the public could rely in so difficult and intricate a matter.

We will, however, endeavour to make our readers part with Mr. Chitty in good humour, by extracting from one of his notes Lord Coke's quaint description of "what properties a parliament-man should have;" and may it be of use in directing the judgment of our newly-constituted electors.

"It appeareth in a parliament roll, that the parliament being, as hath been said, called *commune concilium*, every member of the house being a counsellour, should have three properties of the elephant; first, that he hath no gall; secondly, that he is inflexible and cannot bow; thirdly, that he is of a most ripe and perfect memory; which properties, as there it is said, ought to be in every member of the great council of parliament. First, to be without gall, that is, without malice, rancour, heat and envy. *In elephante melancholia transit in nutrimentum corporis*. Every gallish inclination (if any were) should tend to the good of the whole body, the commonwealth. Secondly, that he be constant, inflexible, and not to be bowed, or turned from the right, either for fear, reward, or favour, nor in judgment respecting any person. Thirdly, of a ripe memory, that they remembering perils past, might prevent dangers to come, as in that roll of parliament it appeareth. Whereunto we will add two other properties of the elephant, the one, that though they be *maximæ virtutis et maximi intellectûs*, of greatest strength and understanding, *tamen gregatim semper incedunt*, yet they are sociable and go in companies; for *animalia gregalia non sunt nociva, sed animalia solivaga sunt nociva*. Sociable creatures that go in flocks or herds are not hurtful, as deer, sheep, &c. but beasts that walk solely or singularly, as bears, foxes, &c. are dangerous and hurtful. The other, that the elephant is *philanthropos, homini erranti viam ostendit*: and these properties ought every parliament-man to have."—4 *Inst.* 3.

The question whether the incumbents of the Established Church of England were originally entitled to the whole tithe or only a portion of it, has recently been revived. There is not, we think, much difficulty in the matter,<sup>1</sup> but as consider-

<sup>1</sup> This must be taken as the individual opinion of the writer. The Editor still entertains considerable doubts upon the point.—*Edit.*

able misapprehension seems to prevail on the subject even amongst lawyers, we will avail ourselves of the opportunity presented by Messrs. Hovenden and Lee, to notice the principal points involved, to which on a former occasion we did little more than allude. These gentlemen think that the clergy at first had only a part of the tithe. We will extract one of the notes of Mr. Lee on the subject—not that it is worth copying, but it will serve to give our readers some idea of his comments.

“ It should seem that the commentator referred tithes payable in particular places to endowment by the lay lord; and if this could be clearly ascertained, it is difficult to discern a difference between the lord’s right to his land, and the parson’s right to his tithes; but neither case severs labour from remuneration. The tithe, when paid into the hands of the clergy, originally operated an exemption of the parishioners from all further contribution on account of parson, church repairs, and poor. The recognition of any personal right to the whole tithe might be termed legal usurpation, resulting from an undue and preposterous clerical influence.”<sup>1</sup> Such is Mr. Lee’s opinion, but he cites no authority whatever.

It is perfectly clear that, during the first ages of the Christian Church, the law and custom were, that the tithes and oblations of the faithful should be divided either into four parts for the bishop, the officiating clergy, the poor, and the maintenance of the fabric, or into three parts, omitting the bishop. This appears from the decrees of popes and canons of several foreign national councils. “ The quadripartite division was chiefly in the diocese of Rome; for by some canons of the French, Spanish, and other churches, it was tripartite, and had other differences. But all this in the primitive times, and from the first establishing of Christianity by a disposition of the hierarchy, till about 500 years from Christ, it seems it continued.”<sup>2</sup> About the year 600 the inhabitants of this island were converted to Christianity by Augustine, a Benedictine monk, who became Bishop of Canterbury. This bishop requested the opinion of the pope on certain points,

<sup>1</sup> 1 Vol. 113, note 36. 3 Vol. 102, note 35.—See Mr. Hovenden’s note on the subject, 2 Vol. 26, note 22.

<sup>2</sup> Selden, c. 6. s. iii. p. 80.

and among others, "how many portions should be made of the oblations of the faithful at the altar." "Respondit Gregorius papa urbis Romæ.—Sacra Scriptura testatur (quam te bene nosse dubium non est) et specialiter beati Pauli ad Timotheum epistolæ, in quibus eum erudire studuit, qualiter in domo Dei conversari debuisset. Mos autem sedis apostolicæ est, ordinatis episcopis præcepta tradere, ut in omni stipendio quod accedit, quatuor debeant fieri portiones; una videlicet, episcopo et familiæ, propter hospitalitatem atque susceptionem, alia clero, tertia pauperibus, quarta ecclesiis reparandis. Sed quia tua fraternitas monasterii regulis erudita, seorsum fieri non debet a clericis suis in ecclesia Anglorum, quæ, auctore Deo, nuper adhuc ad fidem adducta est, hanc debet conversationem instituere, quæ initio nascentis ecclesiæ fuit patribus nostris, in quibus nullus eorum, ex his quæ possidebat, aliquid suum esse dicebat, sed erant eis omnia communia." Assuming that this response of Gregory to his reverend brother was obligatory upon the English church, which it was not, it affords no foundation for the doctrine of either a quadripartite or tripartite division of our tithes, which in fact did not then exist. It was indeed merely a letter of advice how Augustine, under the peculiar circumstances of his case, should dispense the oblations of the faithful. Dr. Lingard puts a most extraordinary construction on this document. He says, "according to a constitution which that pontiff sent to the missionaries, the general stock was divided into four equal portions. (Bed. lib. l. c. 27.) Of these, one was allotted to the bishop for the support of his dignity; another was reserved for the maintenance of the clergy; a third furnished the repairs of the church and the ornaments of religious worship; and the last was devoted to the duties of charity and hospitality. It formed a sacred fund, to which every man, who suffered under the pressure of want or infirmity, was exhorted to apply, without the fear of infamy, or the danger of a repulse."<sup>1</sup> The caution of our legal oracle "petere fontes" is not less necessary in reading history than in law. The intelligent inquirer will ask—when tithes were first granted for the support of the ministers of religion in this country, was any condition or qualifica-

<sup>1</sup> Antiquities of the Anglo-Saxon Church, p. 83.

tion annexed? They were granted, it is well known, during the seventh or eighth century, not, as it is constantly assumed, to priests of the Church of Rome and servants of the papacy, but to ministers of the independent Anglo-Saxon Church, which owned no head but Christ. Tithes are very frequently mentioned in the Anglo-Saxon laws and early English councils, and the payment of them strictly enforced, and "the famous division" of them made by Charlemagne, as mentioned by Blackstone, is not once insisted upon or even alluded to; nor is there any papal decree or constitution which affects to direct a division of tithes in England.<sup>1</sup> It is perfectly clear that the law of England never required any portion of the tithes of a benefice to be expended in the repairs of the body of the church. "By the canon law, parish churches are to be repaired by the parsons of the parish, but the custom of this realm being that the parish churches are to be repaired by the parishioners or inhabitants of the parishes, this canon bound not the clergy."<sup>2</sup> We can trace this peculiar custom from a very early period.<sup>3</sup> It is almost superfluous to add, that it was not Blackstone's opinion that the incumbents of the Church of England were ever required to make a tripartite or any other division of their tithes; though, indeed, one of his sentences, separated from the context, has been adduced as an authority to that effect.<sup>4</sup>

To return to the former object of this article—we regret we cannot approve of the plan on which Messrs. Lee, Hovenden and Ryland have proceeded in their notes. They have not been content merely to correct the errors of the commentator, and to bring up, as it were, his work to the present state of the law, but they have filled his pages with

<sup>1</sup> Our preceding remarks are chiefly drawn from an excellent *Essay on the Division of Tithes in England*, by the Rev. Wm. Hale Hale, M. A., lately published.

<sup>2</sup> 2 Inst. 653. See, too, Carth. 360. 1 Salk. 164, 165. 12 Mod. 83. Dean Prideaux (on Churchwardens, 26, 27) quoting the Laws of Canute, observes, that it is plain the law was the same even then.

<sup>3</sup> See the constitutions of Cardinal Othobon, Archbishop of Winchester, in 1268 and 1305, and the comments of J. de Athon and Lyndwood, thereon. Gibs. Codex, 198. See also "Ordinatio Vicariæ de Chesterton," A. D. 1403. Ken. Par. Ant. 543. Law Mag. vol. i. p. 586.

<sup>4</sup> Blackstone's opinions as to the property of Parochial Incumbents, may be found in vol. i. p. 112, and 384, and vol. ii. p. 26 of his Commentaries.

congregations of cases and acts of parliament almost verbatim. Mr. Lee, indeed, acknowledges the impropriety of this mode, but the temptation appears to have been too great, for his notes are as objectionable in this respect as those of his coadjutors. Thus, he gives us, in a note extending through twelve closely printed pages, the act of 6 Geo. 4, c. 50. for amending the laws relative to jurors; and ever and anon quotations from a book he cites as *Prac. Dict.* with which we are totally unacquainted. In the second volume we find many notes from Hovenden on Frauds, and Hovenden's Supplement to Vesey junior's Reports, which we are sorry have been transplanted. Messrs. Hovenden and Ryland, however, though their ill-judged additions may distract and perplex the student and the general reader, seldom travel out of the record, and their labours require no further remark from us,—but we cannot so quit Mr. Lee. We have already given our readers a specimen of this gentleman's harsh, obscure and ungrammatical style, which alone renders a descent from the text to the note most painful. But this is not all. He perpetually obtrudes the most absurd notions on all subjects mentioned by the commentator connected with religion, morals, and government; and we should ill discharge the duty we owe to the public if we neglected to warn them against expending their money on what they would find to be worse than trash. They shall profit by our experience.

Blackstone is urging the advantage of an academical and liberal education. Hear Mr. Thomas Lee: "Let the press be free, free in the strict sense of the word, and neither law nor any other useful knowledge will essentially suffer from the want of an academical education. Such an education must be the result of permanent statutes, and of authority to enforce them; and the result of both is usurpation over the mind. It is thus that much of the trifling taught at universities centuries ago is still taught there. Religious and questionable dogmas may there be learned; metaphysical confusion find its uneasy seat in the mind; and pure mathematics, that vision of real knowledge, engage, if not wholly distract it. Superadded to these halos, classical erudition floats its feathery distinctions around the brow of the young academic, and he comes forth into the world with a mind from which the fresh



and racy juices of reason have been already crushed by monkish discipline.”<sup>1</sup> This is a noble product of a mind, the fresh and racy juices of which have been nourished by a free press. Lord Bolingbroke has indeed said that one of the vantage grounds to which a lawyer should aspire is metaphysical, and the other historical, knowledge; but we fear his mind was crushed by monkish discipline.

Blackstone says, that in civil society there must be a governing power. Lee says, “Society may exist without a constitution of any superior, previous, being apparent;” and refers to the savages mentioned in Cook’s second voyage.<sup>2</sup>

Let us now hear Mr. Thomas Lee on the subject of the National Debt: “By the sale and purchase of public stock, the continuance of the national debt is prolonged; so long as the shares remain marketable, so long is the means of mischief, if it be one, kept suspended. It is not the principal which is withheld or unpaid by government, for nobody asks for or expects payment, that is the evil; it is the interest exacted at the public hand, to be paid over to a few comparatively, which is. It is said, indeed, and with some semblance of truth, that the interest thus exacted is the life-blood of the state, and that it circulates through every ramification of society, giving out its vitality to the merchants, traders, farmers, &c. and every where infusing and encouraging industry and activity. *Landlords adopted this notion, and raised their rents.* But those who talk about healthy circulation forget the physical fact attendant upon it, namely, that the attrition consequent of circulation destroys, while the circulation itself animates. Farms, it is true, became better cultivated, for an obvious reason, to meet the landlords’ and taxgatherers’ demands, more capital, more skill, more labour, must be embarked in their cultivation; and just in the ratio that rents have risen, the labourer has been ill compensated, poverty has increased, and indigence and crime. I do not mean that high rents and taxes are the direct or only causes; perhaps the increase of population, the competition for the means of living, consequent of numbers, who cannot all find profitable employ, may assist in the work of general deterioration. . . . . I well

<sup>1</sup> Vol. i, p. 33, note 23.

<sup>2</sup> Vol. i, p. 48, note 12.

know that to keep what is called national pledges and public faith, is a great and imperative duty on the part of government. But it may well be questioned whether the government or parliament, in adopting the funding system, did not set the example of breaking faith with posterity. Posterity cannot morally be bound to the observation of contracts to which, in the nature of things, it could not be a party without its own interests and welfare being anticipated and compromised. The interests of the public and of its government ought never to be severed invidiously apart, even in idea; but I do not overstep my function upon this occasion in contributing to the discussion of the question, whether the government well fulfils its duty towards the community by urging and propelling it within the vortex of an all-absorbing taxation."<sup>1</sup> We have not yet finished Mr. Lee's note on this subject, but we cannot drag our readers through the mire any further; if they are not satisfied, they must read it at length in the volume itself. But let him not mistake us; we dissent from the conclusion, but it is the miserable ignorance betrayed in the reasoning that we despise.

Mr. Lee traces, in a long note, "the probable origin and foundation of the law that encircles and rules so mysteriously the marriage state." The wife, he says, was originally a mere slave, and shows this from the history of savage nations; "and the Old Testament, although for the most part describing a condition of society much more advanced, places the wife in no very eminent or even different point of view. Even the decalogue does not exempt her from labour, as it exempts the servants, the ox, and the ass. The wife may not indeed be coveted, for that would have been productive, as it now is, of civil broils, as well as contrary to the decalogue; but for aught that otherwise appears, she, when all else is enjoined rest, is not forbidden to labour on the Sabbath day; unless indeed she be mysteriously comprehended in the injunction put upon the husband, a supposition, the validity of which I by no means deny." Mr. Lee kindly advises the student who would take more enlarged views, to consult the judgments of Lord Stowell.<sup>2</sup>

<sup>1</sup> Vol. i. p. 33, note 23.

<sup>2</sup> Vol. i. p. 48, note 12.

<sup>3</sup> Vol. i. p. 442, note 29.

Mr. Lee deprecates long speeches by counsel : " it is time that a better taste should prevail ; when lengthy dulness shall be made to yield its somniferous potencies to neat conciseness of detail, and to close but appropriate arguments." <sup>1</sup>

It is delightful to find so much philosophy and deep thought attended with the most benevolent expressions. " I like," exclaims our annotator, " the people, as it is called, passing well, but I see little in it but the brute or the infant ; the brute that would trample good under its hoof, or the infant that stands in perpetual need of the nursing care of legislation." <sup>2</sup>

We have now culled a sufficient number of the absurdities of Mr. Thomas Lee to justify our censure, and we wish we could here conclude ; but we have a more serious article of impeachment against him than either dulness or nonsense. He seems to think that any reference to that Being by whom alone kings reign and legislatures enact laws, is improper in Commentaries for the use of students, and that the Christian religion is but a vain and incomprehensible philosophy.

" I meddle not with divine law ; it has various interpreters, where its letter chances to be obscure ; where plainest, it is often incompatible with social life." Many of us must confess that our lives are not in accordance with the law of God, but we never yet met with a writer who plainly condemned the law on that ground.

Blackstone, in explaining the nature of law in its general sense, alludes to the laws of motion in the material world. Mr. Lee observes, " it is to be regretted that, in an elemental work, any position which is the mere deduction of philosophy or of religion, philosophy of another kind, should be adduced for the purpose of illustrating a proposition singly and peculiarly human. By many, even now, the existence of a Supreme Being cannot be conceived ; and to such, the great fact is hardly demonstrable."

A bare and parenthetical allusion of the excellent Commentator to Providence thus excites the ire of Mr. Lee. " These allusions to Providence affecting things so entirely human, and over which humanity, the greatest indication of the power of Deity, has itself so much power and control, if it were wisely and ever conformably with his precepts exerted, appear

<sup>1</sup> Vol. iii. p. 367, note 39.

<sup>2</sup> Vol. iii. p. 390, note 2.

to be quite out of place; for that sublime intervention can scarcely, upon any principle of human reasoning, occur at one and the same time opposed to what our reason adopts as good, and the same reason adopts as evil."<sup>1</sup>

Lord Kenyon observed, that Francis Plowden's *Treatise on Usury* was the first English law book that advocated dishonesty, and we regret that it is not the last. This annotator (we know nothing of him but as such) appears to us to have gone further in the above passages,—to have advocated irreligion too; but, most fortunately, he has advocated both in notes so absurd and nonsensical as to render his lucubrations innocuous.

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#### ART. VII.—RECOLLECTIONS OF SIR JAMES MACKINTOSH.

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[Considering the host of memoirs or biographical sketches of Sir James Mackintosh that have recently appeared, we are inclined to think that the following Recollections of him by an old pupil and friend, will be more acceptable to our readers than a regular Life, in which a great deal of familiar matter would be necessarily repeated, and which, after all, would belong more to literature than to law.—*Edit.*]

THE name of Mackintosh was, in my younger days, mentally identified with that of Parr, who was then his friend in the most enlarged sense of the word, and predicted his future celebrity. I have been present at many colloquial conflicts between the divine and the philosopher; and always thought them in conversation "*magis pares quam similes.*"

Sir James, in the early part of his career, studied medicine, with a view to practise as a physician at Bath, from which project he was dissuaded by Doctor Fraser, who, as Parr told me, "dreaded having such a rival." Even at that epoch so conscious was he of the extent of his own intellectual powers,

<sup>1</sup> Vol. iii. p. 378, note 73.

that he advertised as "in the press and speedily to be published" a treatise on some branch of medical science, of which he had not written a single line.

When Burke published his celebrated "Reflections," numerous antagonists took the field against him, including Paine, Priestley, Price, and a host of minor assailants, whose weapons were as harmless as the javelin hurled by Priam against Pyrrhus.<sup>1</sup> Far different was the case with the "*Vindiciæ Gallicæ*," which at once raised Mackintosh to a high rank in the political and literary world, and extorted the praise of even Burke himself. It is, indeed, a wonderful performance, considering the age of the author, which could not be more than 24. It is written in a style totally different from that which characterized his subsequent productions, being diffuse, vehement, impassioned, and figurative. Its tendency is decidedly democratical. Nevertheless, the tone throughout adopted towards Burke, is that of deferential respect and admiration; and in that point of view it is strikingly contrasted with the bitter vituperation of Paine and Priestley.

A few years afterwards (1795 or 1796) Mackintosh wrote, in the *Monthly Review*, a critique upon Burke's "Thoughts on a Regicide Peace," in the perusal of which, the reader's admiration is almost equally divided between the author and his reviewer. In truth, it is a matchless specimen of dignified criticism, which could not fail to be highly gratifying to Burke, whose good will it so conciliated as to lead to the critic's being invited to Beaconsfield. In that classic abode, the vindicator of the French Revolution passed several days in the society of his distinguished host, for whom, notwithstanding the difference of their political sentiments, he imbibed

<sup>1</sup> This certainly was not the universal opinion at the time. Wyndham, for instance, is well known to have considered Paine the more formidable opponent of the two. As a proof of Paine's fitness for fighting Burke with his own weapon of imagery, Wyndham was fond of quoting Paine's remark that, in reserving all his commiseration for the nobility and laying the people's sufferings entirely out of the account, Burke "pitied the plumage but forgot the dying bird." Mr. Prior, however, in his excellent life of Burke, speaks of his relation to Mackintosh in nearly the same terms as our reminiscence. Perhaps Mr. Campbell's estimate of the merits and effect of this work comes the nearest of any to the truth, though he praises the argument on Church Property too highly. See the *Metropolitan Magazine* for July 1832.—*Edit.*

a reverence which on all occasions he delighted in expressing, and which, it may be fairly presumed, had considerable influence in bringing about the change that subsequently occurred in his own notions.<sup>1</sup>

Sir James's first wife was then living. She was the sister of Peter and Daniel Stuart, the respective proprietors of the *Oracle* and *Morning Post*, the former a Pittite, the latter a Foxite paper. Mackintosh, as Parr told me, wrote leading articles for each of those journals suited to their respective politics. At this epoch, he was on habits of friendly intercourse with Sheridan, Parr and his ill-fated and highly-gifted pupil Joseph Gerald, Goodwin (who was then in the zenith of his fame), Romilly, Hargrave (the late King's Counsel and Recorder of Liverpool), Felix Vaughan, Clayton Jennyns, George Moore, Charles Warren (afterwards Chief Justice of Chester), and Sir Francis Burdett, in conjunction with whom he was proud to range himself under the banners of Charles Fox. This led to his subsequent intimacy at Holland House, where, during the latter years of his life, he was quite on the footing of *un ami de la maison*, and where his extraordinary colloquial powers obtained an excellent field for their habitual exercise.

Before, and for many years after the publication of his "*Vindiciæ Gallicæ*," his practice as a Barrister being inconsiderable, his chief reliance, for the support of himself and his family, was on his literary exertions, which were almost exclusively confined to the reviews and the two before-mentioned newspapers. He then resided in Serle Street, Lincoln's Inn, in a house afterwards occupied by Mr. Horace Twiss.

His first effort of any importance as an advocate, was as counsel for Peltier, Editor of "*L'Ambigu*," who, during the continuance of the Peace of Amiens, had inserted in that journal a libel on the First Consul. This speech was delivered before the late Lord Ellenborough, who, in his charge to the jury, pronounced it to be "the most eloquent oration he had ever heard in Westminster Hall." It was, indeed, as I can testify, a splendid specimen of forensic oratory. The accumulated stores of a vigorous and highly cultivated in-

<sup>1</sup> It is said that by the end of the third day Burke had fairly talked him over.—*Edit.*

telleet were poured forth profusely on a subject at that time intensely interesting, I mean the First French Revolution. Of that stupendous event Mackintosh drew a masterly picture, in which Napoleon was the leading figure. Nevertheless, although it was allowed by all to be a brilliant display of historical knowledge and philosophical acumen, it was thought by many, and among others by Peltier himself, to be injudicious as a defence.<sup>1</sup> From this speech, it was evident that the horrors of the reign of terror, and probably the writings and conversations of Burke, had combined to effect a considerable change in Sir James's political sentiments, of which a more striking manifestation appeared soon afterwards in his beautiful "Introductory Discourse to a Course of Lectures on the Law of Nature and Nations." A copy of this pamphlet was sent by him to Mr. Pitt, who not only wrote a very complimentary letter in reply, but successfully exerted his powerful influence as a Benchet, in obtaining for the author the use of Lincoln's Inn Hall, notwithstanding a strong opposition excited by the recollection of his "*Vindiciæ Gallicæ*." I had the gratification of hearing two courses of those lectures. No portion of them has yet appeared in print. From a small manuscript volume containing part of my notes taken at the time, I purpose, at the conclusion of this article, to insert some select passages.<sup>2</sup> They will convey only a faint idea of the luminous view which the lecturer took of several of the most interesting branches of Ethics, and of the eloquence and philosophy displayed by him in their illustration. During the second course I was applied to by Sir James for the use of my notes of a lecture of which he had lost his own memoranda; and at the opening of the lecture in question, he alluded in the most friendly and flattering manner to his loss, and the manner in which it had been supplied. I cannot give a more striking proof of his good nature than is afforded by this anecdote; and on that account only is it alluded to. Canning, with whom Mackintosh had

<sup>1</sup> The orator thought fit to pass several high encomiums on the talents of the first consul; and Peltier complained every where in his broken English, that the fellow, as he called Mackintosh, had sacrificed him to show off in praise of Napoleon. The fee on this occasion was five guineas.—*Edit.*

<sup>2</sup> We are obliged to postpone the insertion of these, not having received them till the number was made up.—*Edit.*

become acquainted, attended several times at Lincoln's Inn Hall, and Lord Archibald Hamilton almost invariably.<sup>1</sup> Nothing could exceed the attention with which the lectures were listened to by a numerous auditory, chiefly consisting of students of the different Inns of Court. On one of these occasions a singular circumstance occurred. Mackintosh had taken his station at the table, and we were all expecting him to address us, when suddenly a letter was put into his hands, by the perusal of which he was visibly much agitated. Well, indeed, he might be, for it announced to him an addition of three children to his already numerous family. He instantly made a hurried apology for postponing the lecture. The children died shortly afterwards.<sup>2</sup>

It was about this period that a coolness commenced between Mackintosh and his friend Parr. The doctor, a staunch and zealous Foxite, was highly indignant at the conduct on the part of Sir James, which had led to the patronage of Mr. Pitt, through whose influence with Lord Sidmouth (then prime minister) he obtained the Recordership of Bombay. The attention of the public had recently been drawn to the trials of Arthur O'Connor and others, at Maidstone, for high treason, which were the occasion of a celebrated repartee of Parr, of which the following is an accurate account:—In a conversation, at which several persons were present, Mackintosh, who had strongly reprobated the conduct of Quigley, an Irish Catholic priest who was convicted and executed, was several times interrupted by Parr's saying, emphatically, in

<sup>1</sup> Another occasional auditor was Godwin, whose "Political Justice," in which the most ardent hopes of the perfectibility of man are put forth, was just then in the zenith of its unprecedented though short-lived celebrity. Hazlitt tells a story of Godwin's having first entered the Hall just as Mackintosh was winding up an eloquent period against "the idle theorists who built their expectations upon such absurd chimeras as a golden mountain or a perfect man."—*Edit.*

<sup>2</sup> The author of "The Clubs of London" (Mr. Adair, the friend of Fox, we believe,) tells this story differently. He says that Mackintosh was on the circuit when news of the birth of one of the children arrived, upon which the regular congratulations were offered, and the health of the lady duly toasted by the bar—that at the next assize town came news of the birth of a second child, whereupon the same ceremonies were renewed; and the happy parent had actually reached a third assize town before the full extent of the blessing was made known to himself and his professional friends, who of course had no objection to drink health and happiness to father, mother and infant again.—*Edit.*



the intervals of smoking, "He might have been worse." At length he called on the doctor to explain how Quigley *could* have been worse. This was exactly what Parr wanted. Accordingly, having laid down his pipe with deliberate composure, he replied, "I'll tell you, Jemmy, Quigley *was* an Irishman; he *might have been* a Scotchman,—he *was* a priest; he *might have been* a lawyer,—he *was* a traitor; he *might have been* an apostate." The doctor then exultingly resumed his pipe amidst a roar of applause at this unexpected sally.

At Bombay, Sir James kept up the reputation for talent and eloquence he had acquired in England, and gained the esteem equally of the natives and of Europeans by his able and impartial conduct in the seat of judicature. At the expiration of seven years he returned to Europe, and was speedily brought into Parliament through the influence of the Whigs, in alliance with whom he thenceforth, up to the time of his decease, cordially and zealously co-operated in advocating the principles of civil and religious liberty, and united his endeavours to those of Sir Samuel Romilly, to obtain a mitigation of the severity of our penal code.

As a parliamentary debater, he was undoubtedly of the highest class.<sup>1</sup> But he was not what is called "a ready-money man," like Pitt, Fox, Sheridan, Brougham, Canning and Plunkett. His speeches were generally luminous and philosophical orations, the offspring of deep reflection and study, replete with classical and historical erudition.

Many of the most masterly articles in the Edinburgh Review are from the pen of Sir James Mackintosh. Shortly after his return from India, he announced his intention to publish a new History of England, and, with that view, publicly solicited the use of ancient manuscripts in the possession of private families. It is deeply to be lamented, that he did not complete an undertaking for which he was so pre-eminently qualified.<sup>2</sup> The volumes written by him for

<sup>1</sup> We have often heard him; and, in our opinion, the character and effect of his parliamentary eloquence is most accurately described in the New Monthly Magazine for July 1832.—*Edit.*

<sup>2</sup> He had only completed a part of the third volume at the time of his death. The history, expanding as it came to later times, was intended to occupy eight or nine volumes.—*Edit.*

Lardner's Cyclopædia, are a beautiful abridgement of English history. His Life of Sir Thomas More (in the first volume of "The Lives of British Statesmen,") is an exquisite specimen of Biography, evidently written *con amore*. Where shall we meet with a finer specimen of chaste and simple eloquence, than the following character of that truly great and excellent man?

"Of all men nearly perfect, Sir Thomas More had, perhaps, the clearest marks of individual character. His peculiarities, though distinguishing him from all others, were yet withheld from growing into moral faults. It is not enough to say of him, that he was unaffected, that he was natural, that he was simple; so the larger part of truly great men have been. But there is something homespun in More, which is common to him with scarcely any other, and which gives to all his faculties and qualities the appearance of being the native growth of the soil. The homeliness of his pleasantries purifies it from show. He walks on the scaffold, clad only in his household goodness. The unrefined benignity with which he ruled his patriarchal dwelling, at Chelsea, enabled him to look on the axe without being disturbed by feeling hatred for the tyrant. This quality bound together his genius and learning, his eloquence and fame, with his homely and daily duties, bestowing a genuineness on all his good qualities, a dignity on the most ordinary offices of life, and an accessible familiarity on the virtues of a hero and a martyr, which silences every suspicion that his excellencies were magnified.

"He thus simply performed great acts, and uttered great thoughts, because they were familiar to his great soul. The charm of this inborn and homebred character, seems as if it would have been taken off by polish. It is this household character which relieves our notion of him from vagueness, and divests perfection of that generality and coldness to which the attempt to paint a perfect man is so liable. It will naturally and very strongly excite the regret of the good in every age, that the life of this best of men should have been in the power of him who was rarely surpassed in wickedness. But the execrable Henry was the means of drawing forth the magnanimity, the fortitude, and the meekness of More. Had Henry been a just and merciful monarch, we should not have known the degree of excellence to which human nature is capable of ascending. Catholics ought to see in More, that mildness and candour are the true ornaments of all modes of faith. Protestants

ought to be taught humility and charity from this instance of the wisest and best of men falling into what they deem the most fatal errors. All men, in the fierce contests of contending factions, should, from such an example, learn the wisdom to fear, lest, in their most hated antagonist, they may strike down a Sir Thomas More; for, assuredly, virtue is not so narrowed as to be confined to any party; and we have in the case of More a signal example, that the nearest approach to perfect excellence does not exempt men from mistakes which we may justly deem mischievous. It is a pregnant proof that we should beware of hating men for their opinions, or of adopting their doctrines because we love and venerate their virtues."

In the niceties of classical erudition, Mackintosh was not to be classed with Porson, Parr, or Burney. But, with the writings of the poets, historians, and philosophers of Greece and Rome, he was thoroughly conversant; and no one that I have ever met with had such an extraordinary power of displaying to advantage those innumerable splendid passages from ancient and modern literature with which his memory was stored, and which were made by him subservient colloquially to the illustration of every topic that came upon the tapis.

In English law Sir James was not very profoundly versed, nor did he in Westminster Hall acquire the reputation of a skilful advocate.<sup>1</sup> His most successful forensic efforts were addressed to the Privy Council; and latterly he ceased to plead before any other tribunal. I recollect, many years ago, hearing a masterly oration delivered by him at the Cock-Pit, on which occasion Mr. Pitt entered the room after he had spoken for about ten minutes. Mackintosh, at the request of the President, recommenced his speech, to which Pitt (behind whose chair I happened to be standing) listened most attentively; and I heard him say to the first Lord Liverpool, who

<sup>1</sup> The following story is told in illustration of his inefficiency as an advocate. Whilst he was once addressing a jury, Henry Blackstone, the brother of the judge, was engaged in taking notes of the speech for the senior counsel who was to reply, till at length, wearied out by the irrelevancy of the oration, he wrote down—"Here Mr. Mackintosh talked so much nonsense that it was quite useless, and indeed impossible, to follow him."—*Edit.*

was sitting next to him, "*Very* able," pronouncing the word *very* with marked emphasis.

As a writer, the fame of Mackintosh would have stood higher if he had devoted his splendid talents to the completion of some great work, instead of displaying them chiefly in the periodical journals; for which, however, his professional, judicial, and senatorial occupations successively furnished a valid excuse. The extent of his high intellectual faculties could not have been guessed from his physiognomy, as is strikingly the case in that of Godwin, so admirably portrayed by the pencil of Northcote. But, what is rarely the case with authors, his conversation (like that of Johnson) enhanced, instead of diminishing the reputation he had acquired by his writings.<sup>1</sup>

Doctor Parr often expressed his opinion, that Mackintosh was the greatest metaphysician of the age in which he lived; and of his powers in that respect there are many traces in the beforementioned lectures. One thing I am particularly struck with: I mean the uniform good taste which pervades all the productions of his pen, and their total exemption from pedantry and dogmatism. His style is distinguished by the union of simplicity, vigour, terseness, and perspicuity, with a frequently recurring "*curiosa felicitas*" of expression. We meet with no "*sesquipedalia verba*," no elaborate construction of periods, and very little of antithesis. If we have occasion to repertuse a sentence, it is from admiration of its beauty, and not from any doubt of its meaning. His quotations and illustrations are peculiarly happy, and are always admirably suited to and interwoven with the topics to which they relate.

He might almost be said to have learned by heart the works of Cicero, so thoroughly was his mind imbued with their contents. The English prose writers whom he was most fond of quoting were Lord Bacon, Hooker, Milton, Locke, Hartley, Barrow, Jeremy Taylor, Swift, Addison, Paley and Burke.

<sup>1</sup> When Mackintosh visited France in 1802, he was the lion of the *soirées*, where he was considered very greatly superior to Fox. Madame de Stael's admiration of him is well known, but she always complained of his wanting genius.—*Edit.*

Sir James's manners were simple and unaffected, his disposition amiable, his habits temperate, and his fulfilment of the duties of domestic life exemplary. No one probably ever profited more from books. His memory was a storehouse, in which the choicest products of the human intellect in every age and country were carefully preserved, so as to be always ready for immediate use. No one excelled him in skilfully embodying and amplifying what he had thus acquired. In that respect he is, perhaps, more remarkable than for originality of thought or fertility of invention.

In conclusion, Mackintosh was an eloquent advocate, an able and impartial judge, a first-rate parliamentary speaker, a profound metaphysician, an erudite and accomplished scholar and critic, and a prose writer of the highest class.

[One or two facts have reached us which it may be as well to annex to this account. On Sir J. Mackintosh's return from India he was offered a place by Mr. Percival, which he declined; and on Dugald Stewart's death he had the option of succeeding to the Professorship of Moral Philosophy at Edinburgh. It has long been a matter of regret to many of his most intimate friends that he did not avail himself of this opportunity; moral and metaphysical inquiries being, in their opinion, the walk in which of all others he was most qualified to shine. Never, perhaps, was man less fitted for the bustling scenes of political life, of which a singular evidence was given on the introduction of his last bill for the amendment of the criminal law. An alteration having been proposed and assented to, Sir J. Mackintosh took up a pen to make it, but, like Addison on a somewhat similar occasion, found himself quite unable to proceed, and was giving up the task in despair, when Mr. Spring Rice took the pen from his hand and scribbled off what was necessary.

Sir James's acceptance of the Recordship gave great offence to his friends. One of the many severe reflections of Parr has been given above,—and Mr. Perry, meeting him as he came from Downing-street, inquired if he felt no compunction at receiving honours and emoluments for opinions which had sent some of their common friends into exile for life. But unluckily Parr did not confine himself to repartee, and a piece of scandal, originally circulated by him, long cast a shade over Sir James Mackintosh's character, and has never yet been publicly cleared up. To put all future insinuations to rest, we will briefly relate the incident to which we allude.

Amongst the victims of the political prosecutions instituted by the English government during the first years of the French revolution, was one whose case excited particular commiseration at the time, and a subscription was raised for his daughter by the leading members of the liberal party. Sir James Mackintosh had collected £20 for this purpose, which Mr. Perry, who acted as treasurer, requested him to keep, it not being wanted immediately, and the sum was carried to his account in Mr. Perry's books. On his accepting the recordship, Mr. Perry wrote

for the money: Three weeks having elapsed without his hearing about it from Sir James, he wrote a second time, and in rather peremptory terms. Immediately on the receipt of the second letter the money was paid, and the inattention accounted for by the hurry and bustle of an approaching departure for India. Parr, however, availed himself of the circumstance to insinuate that his quondam friend wished to pocket the money; and this calumny was seriously revived about eight or ten years ago by the *John Bull* newspaper. On this occasion a meeting of Sir J. Mackintosh's most eminent professional friends took place to consider the expediency of a prosecution. Lord Brougham, Sir N. C. Tyndal, Sir James Scarlett, and Sir Thos. Denman were present, when all the circumstances of the transaction were detailed and Mr. Perry's book produced, but, principally by Sir James Scarlett's advice, it was resolved to permit the matter to drop. It is almost unnecessary to add, that none of Sir J. Mackintosh's acquaintances ever entertained the slightest doubt of the groundlessness and absurdity of the accusation. If, situated as he then was, he was seeking to evade the payment of a paltry debt so evidenced, he must have been not simply dishonest but mad.—*Edit.*]

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ART. VIII.—THE REFORM ACT.

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1. *The Act 2 Will. IV. c. 45, with Notes and Index.* By A. E. COCKBURN, Esq.
2. *Parliamentary Reform Act, with Notes, Digest, &c.* By FRANCIS NEWMAN ROGERS, Esq.
3. *The Act, &c. 2 Will. IV. c. 45. with Notes, Tables, &c.* By WILLIAM CARPENTER ROWE, Esq.
4. *A Treatise on the Reform Act, 2 Will. IV. c. 45, with Practical Directions, &c. Copy of the Order in Council, and an Appendix, containing a Copy of the Act.* By WILLIAM RUSSELL, Esq.
5. *The Acts 2 Will. IV. c. 45, and 2 & 3 Will. IV. c. 64, with an Analysis, Tables, &c.* By WILLIAM FINNELLY, Esq.

In the Fourteenth Number of this Magazine we noticed the details of the original Reform Bill as first sent up by the House of Commons to the House of Lords, which assembly,

it is not yet forgotten, rejected that measure on the second reading. At that time we thought it our duty to express strong apprehensions that the measure, if passed in its then state, would be found greatly defective in practice, particularly as regarded the machinery of registration; and many difficulties, which appeared to us likely to occur, were pointed out in that article. It appeared that neither those fears in that respect were groundless, nor (so we flattered ourselves) those observations altogether thrown away; for the Bill, on its reappearance in Parliament, exhibited a great variety of additions and improvements, many of them in direct accordance with our own suggestions. In a second article on the New Bill we felt encouraged to offer some further strictures on the details of the measure as then introduced; and we are again happy to find, on examining the Bill as amended in the committees of both Houses, that those latter observations were also, for the most part, founded in truth and a right perception of the various points which were the subjects of our comments. Our present purpose, now that the Reform Bill has become the Reform Act, is to facilitate its operation, so far as lies in our power, by preparing those who are called upon to act under it against such doubts or difficulties as may seem to us likely to occur in the exercise of their several functions.

The 20th day of June, both in the present and every succeeding year, is the day fixed upon for the commencement of the registration process in the *county* elections. On that day the overseers of every parish are directed to exhibit a notice, requiring all persons claiming to vote at the election for county, riding, or division of a county, in respect of property situate within the parish, to send notice of their claims before the 20th day of July ensuing. On the 31st July they are directed to make out and publish a list, comprising the names, &c. of all such persons as shall have so claimed. The proceeding in borough registration differs in this respect from the above, that it begins on the 31st July by the overseers making out and publishing a list of such persons as in their judgment are entitled to vote. With regard to this proceeding in counties for the present year it is observable, that the day on which we are now writing is the 6th July, and the Bill of Boundaries

and Divisions has not yet become law, without which it is clear the parish officers would not be able to act as required on the 20th June. The possibility of this circumstance was foreseen, and a clause introduced in the House of Lords to meet the difficulty, enacting that, in such case, the several parts of the registration process shall not take place on the several days respectively assigned to them by the Act, but that his Majesty, by the advice of his Privy Council, shall appoint such other days in the present year for the several parts of the process as shall seem expedient.

On or before then, some day certain hereafter to be determined by an Order of Council,<sup>1</sup> all persons wishing to qualify themselves as county electors for the ensuing year must send in their claims to the overseers of the parish in which the property lies in respect of which they claim to vote. If it lies partly in one parish and partly in another, and the several parts do not each amount to the requisite value, viz. 40s. in case of a freehold, £10 in case of a copyhold or leasehold, and £50 rent in case of tenancy at will, we do not know how it will stand with the claimant in the barrister's court should any clever objector undertake to defeat his claim. The proof of his title must correspond with his notice of claim; a variance herein will certainly be fatal. Now by the form of the notice given by the Act, (see Schedule H, No. 2,) which, it is apprehended, must be adhered to, he is called upon to answer the question, "where situated *in this parish?*" We advise him, if he is anxious to vote, to notify the situation of his property not only as to the portion of it *in this parish*, but as to those in the other or others also as the case may be, and send his notices to the officers of each parish; not minding the circumstance, that should his claim be successful, which we do not guarantee, his name will stand several times repeated in the county register. There is another fault in the form of the notice of claim above alluded to, namely, that it may be honestly and fairly sent by any person who has not

<sup>1</sup> By an Order of Council dated 10th July, the 25th July in the present year is substituted for 20th June, and, with this one exception, every period of the registration process is deferred to exactly one month later; so that the register for the ensuing election will be in force on the first December next.



been in possession of his qualification the requisite period, leaving it to the objector to find out that fact. He should have been made to say in his notice of claim, that he has been in possession of the property for twelve months previous to the 31st July. We may as well mention, that our claimant must not forget to send his shilling in each case, as that omission would avoid his notice. This tax has at length been fixed upon as the best way of compensating the parishes for registration expenses; and it seems to us both convenient and fair, provided only it prove sufficient; otherwise the poor-rates will suffer, the unfairness of which we have pointed out before.

In the borough registration, the voter has no need to make claim, unless omitted in the list of the 31st July; yet here again the same difficulty as that above described in the county will occur to the overseers in the preparation of that list. A man's house is frequently situate in one parish, and the garden or bit of land which is necessary to raise his occupation to £10 is situate in another. The overseers of neither parish notice his occupation as sufficient, and with a perfect right to vote by virtue of sect. 27, he is omitted from all lists. Then arises precisely the same difficulty of preferring his claim as in the case of the county voter above-noticed; save and except the shilling tax, which in boroughs is made a condition not of claim but of actual registration, to be added to, and levied at the same time with, his poor-rates. There is some tyranny in this: because it is clear a man may be registered as a voter for the borough without taking any step himself, and without wishing to become an elector, but the shilling, added to his poor-rates in respect of that privilege, he must pay, will he or not, in peril of a distress. We have the same virtuous hope which Lord Althorp and other Whigs seem to cherish, that no Englishman will be found so politically base and abject as to estimate this great privilege at less than one shilling value; but on the other hand, it must be remembered that there are very few Englishmen who like to pay a shilling for nothing, and that if we are to pay a shilling a year for annual registration, annual parliaments may be expected to rise considerably in the market. We do not so much fear,

however, an additional demand for these, as an additional tendency to diminish the number of constituents which may result from this tax; since, in the present state of things, it may be seven shillings, and not one, which a man may have to pay for the advantage of once exercising his vote. We presume it is intended to touch this little matter in the new Bribery Bill.

There will be found in many boroughs a class or classes of voters for whom no provision whatever has been made in respect of their registration. The three lists of voters directed to be made out have their forms appointed in Schedule (I), and are severally entitled thus:—"No. 1. The list of persons entitled to vote in the election of members for this city (or borough) in respect of property occupied within this parish, (or township, &c.)" No. 2. "The list of all persons (not being freemen) entitled to vote in the election of members for this city (or borough) in respect of any rights other than those conferred by an act passed in the second year of the reign of King William the Fourth, &c." No. 3. "A list of the freemen of the city, &c. entitled to vote, &c." Of these lists No. 1 and No. 2 are to be made out by the overseers; No. 3 by the town-clerk. The first list, it will be seen, comprehends the £10 householders and none other, and of these each parish of course will publish its own list; but if each parish should, as directed by section 44, publish a list entitled according to the form No. 2, then as many parishes as there be in the borough, so many lists of the form No. 2 will be made out perfectly identical with each other; for the list is directed to be entitled "of all persons" generally, and not "of all persons resident within the parish, entitled to vote, &c." But if this should not be thought imperative, and each parish should trouble itself only with the notification of its own residents entitled as aforesaid in No. 2, then what becomes of such persons as, being not resident in any parish within the limits of the borough, are, notwithstanding, entitled to vote as described in list No. 2? Such persons, it is enacted, shall retain their votes provided they reside within seven miles of the borough; but it is only the parishes within the borough which are called upon to make returns of persons entitled to vote. See section

44. It is in vain, therefore, that their franchise is preserved to these old classes of voters on condition of their residence within seven miles of the polling-place, unless they reside within the actual limits of the borough itself. There is no avenue by which they can obtain introduction into the Register; and, unless registered, it is clear they cannot be admitted to poll.

While upon the subject of these borough lists, we may mention that the task allotted to the town-clerk, of returning all the freemen *entitled to vote*, will prove one of much greater trouble and difficulty than seems to have been contemplated in section 56. In that section provision is made for all expenses incurred by overseers, returning officers and clerks of the peace, in the process of registration, but no mention whatever is made of the town-clerk. This officer is at once in possession of the names of all freemen, but in order to make out a list of such as are "entitled to vote," he must ascertain their residences and the respective distances of these from the limits of the borough, and whether, in certain cases, they have paid scot and lot during the required period. These inquiries, too, it will be seen, if prosecuted at all, must refer back to an indefinite period of time; for a man entered in the books fifty, sixty, or seventy years ago, may be alive yet, and entitled to vote; the latter period will, in many boroughs, include the names of from 10 to 20,000 persons. The town-clerk, therefore, will probably pursue one or the other of these two modes of proceeding; he will either place on his list the names of all persons admitted freemen within a certain period, whom he does not know to be dead, and leave their places of abode to be ascertained (as by section 50 may be done) at the time of revision; or he will place in the list those persons only whom he shall know to be living and whom he shall know to have been resident within seven miles of the polling-place for the six months next previous to the 31st July. A list made upon the former plan will of course be very redundant, and require much revision by the barrister; while one made out on the latter plan will be as much too narrow, unless infinite trouble be bestowed upon it by the town-clerk; and the list of claimants, whose titles will have to be proved before the court of revision, will be numerous in proportion.

The province of objector comes next to be considered. In the county list of each parish, which it will be remembered is a list of all the claimants to vote, the overseers themselves, by writing "objected to" against every name published therein, might bring the claimant into court to prove his qualification. We think the overseers will best discharge their duty this first year of registration by objecting to every claim, of the correctness of which they are not well satisfied in their own judgments. There is nothing, however, in the act, to compel them to this course, and certainly these officers will find themselves possessed herein of great power to favour their fellow parishioners in the attainment of the franchise. And this power consists not so much in omitting to object, as in first objecting and afterwards abandoning or not pressing this objection in the court of revision, third parties having in the mean time omitted to give notice, in consequence of an objection having been already made. The barrister, therefore, will do well to have his eye upon the overseers in such cases; for although the section 50 is so worded that a person objected to in the above manner must, at all events, come forward and prove his qualification, yet it will be in the power of these officers, unless particularly questioned on that point, to suppress circumstances within their knowledge which might disqualify his vote. Third parties making friendly objections will not have so great an advantage in this respect; unless, indeed, they can, by making it known that they have given the proper notice, induce others not to take that step; then, failing to appear in the Barrister's Court, the vote objected to is at once allowed. The words, "unless the party so objecting shall appear by himself or by some one in his behalf in support of his objection," will probably raise the question, whether, upon non-appearance of the objector, any person entitled by this act to object, may appear on his behalf and support the objection, though not deputed by him for that purpose. There will be no hesitation, however, in deciding this point in the negative; for how shall a party be said to "appear by some one in his behalf" unless he shall have commissioned some one to appear for him?

A similar question on the right of objecting in the borough

registration court, has been already pointed out by Mr. Russell, in p. 86, of his succinct and able treatise on the Act. A person omitted in the overseers' list claims to be inserted; in this case, notice of objection having been impracticable, is it competent to any one to step forward as objector and tender evidence of disqualification? Judging by analogy from the provision above-cited, we think (differing from Mr. Russell,) that the opposition to the vote, when *prima facie* set up, can go no farther than examination of the claimant himself and the overseers.

A preliminary step in the trial of every disputed vote will be to prove the service of the proper notices as required by the act. For this purpose it will be necessary in all cases to have duplicates of these documents, and proof of the manner of their service. With regard to this latter point, it will behove both objector and claimant to make as good services as possible upon the proper parties; for the question of what shall be a proper service is new in this case, and will depend for the most part on the barrister's judgment. He must also provide such evidence thereof as will be easy to produce in court; for although the party served might himself be examined as to this point, yet there is no need for him to attend, nor, for anything we can discover, to answer, if present, and sworn, unless he be an overseer. The best way will be, for every person giving notice to carry the notice himself,—at all events, not to send it by post—also to preserve a duplicate.

It may be well to remark, that overseers, in making out their county lists, should, by no means, omit the name of any claimant, however ill-founded in their judgment his claim may be, but merely write "objected to" against his name, as directed in section 38. Section 43 might seem to imply the contrary of this; which empowers a claimant, whose name shall have been omitted from the county list, to prove before the barrister that he gave due notice to the overseers, and then, on proof of his qualification, the barrister may insert his name. This qualification ought in reason to be the one whereof he gave notice to the overseer; that, however, in consequence of an oversight, we presume, is not so; for by the terms of the section, he shall be inserted on proving his title to vote "in respect of *any* lands and tenements within such parish or

township." In all cases then, where due notice of claim has been given, it will be a great advantage to be omitted from the list, since no one will be prepared to oppose the vote in the barrister's court with evidence of disqualification. This, therefore, is another mode in which overseers may favour their fellow-parishioners, though not without a breach of duty, being required by section 38 to publish the names of *all* claimants.

The functions of the Clerk of the Peace are simple and plainly defined, and free from any difficulty, so far as we can discover. He receives the parish lists of claimants and persons objected to from the hands of the High Constable of the hundred or other district to which such parishes respectively belong: to which officer they are transmitted by the overseers for that purpose. The Clerk of the Peace transmits *forthwith* to the Barrister an abstract of the objections, that he may know how many votes he will have to try, before he appoints, by advertisement, the times and places of holding his court. This abstract, as it is called by the Act, should state not only the numbers and names of the parties objected to, but also the nature of each disputed qualification, and the parish in which the property is situate, in respect of which the vote is claimed; for the barrister will be unable, without such information, to form any opinion of the time he will be called upon to bestow upon the several points of his circuit, and to make his arrangements accordingly.

At the *first* court held by the barrister for the revision of the county lists, the Clerk of the Peace puts him in possession of *all* the lists, and is absolved, it should appear, from any further attendance or trouble, until the lists are transmitted back to him corrected, for the purpose of being compiled into one book or register. The delivery of this into the hands of the sheriff concludes the functions of this officer.

The functionary who next claims our attention, is one whom we approach with feelings of a deep and reverential awe, mingled with a painful anxiety on account of the difficulties and dangers attendant upon his exalted situation;

we mean that electoral judge the Registering Barrister, or Barrister in Eyre, or whatsoever may seem his most appropriate description. Certainly his functions are of a high and extraordinary nature; in him is the setting of the springs, the oiling of the wheels, the moulding of the elements of the present government and constitution of the country; and on him devolve, in the last resort, the numerous and various difficulties of administering this Act of Parliament; not only those of the subordinate functionaries referable to his decision, but a great many others which are peculiarly and originally his own. While envious, perhaps, of his exaltation from our own level, the sympathy and fellow-feeling we entertain for him are not a whit the less sincere; and, to say the truth, we cannot shut out some melancholy forebodings in respect of his judicial prospects. A lonely wanderer, in a chaise and pair, he struggles through unknown tracts into a far country; no sheriff and troop of country gentlemen to forestall his arrival with greeting; no javelin men to environ his chaise and pair; no trumpet to give lively signal of his approach: about the hour of dusk he reaches the door of the principal inn; and no one knows that the Barrister is come. His clerk is dispatched with a civil note to the returning officer to inquire what will be the most convenient place for holding his court; the returning officer returns for answer, that he has no opinion whatever on that subject, that he is going out of town for a few days, and should Mr. — have finished revising the lists before his return, he will be so kind as to leave them in the custody of his wife or shopman. On a conference with the overseers and town-clerk, if there be one, the town-hall, if there be one, is fixed upon as the properest place for the occasion; but the consent of the corporation (deprived of its borough-domination, perhaps, by the Reform Act,) must first be obtained, and a satisfactory compensation ensured for the use of the building. In places where there is neither corporation nor town-hall, it is clear some large room must be hired for a court; we hope the question of "who must pay for it," will not arise between the barrister and the overseers; if it should, the barrister will, of course, have the firmness

to decide in his own favour. At length, behold him, at whatever cost, seated on some extempore elevation in the centre of his own court; "monarch of all he surveys; *his* right there is none to dispute;" he feels like a Roman prætor in the curule chair, or a caliph of Bagdad, about to distribute from his throne impartial justice to the assembled crowd. Alas! he will find the want of lictor and fasces; he is a caliph without a body-guard; a Duke of Wellington, called to take command without a single adherent. He unites in his august person judge, jury, counsel, sheriff, under-sheriff, crier of the court, javelin-man, and constable. There is no one to swear the witnesses, to call "silence" for him, or say "take your hat off in that there corner;" or rather, every one calls "silence" when he has finished his own conversation, and the hats are knocked off by unauthorized persons, without notice to the parties. Here ensues a scuffle and a fight, which, for the better convenience of all parties, is adjourned into the streets. Meanwhile the work of revision proceeds; fervet opus; the overseers wave their spectral scrolls of ill-inscribed paper; the claimants gather round, and with eager eyes, inflamed faces, and electoral gestures, demand justice of the barrister, and the rights of Englishmen; they try his principles, with "blue for ever!" "pink for ever!"—a point arises; the parties blaspheme, the attorneys quarrel, and accost each other with extremely indecorous language; and by the aid of these arguments, the barrister proceeds "upon the hearing (what hearing?) in open court, finally to determine" the merits of the question. The words of the Act are ambiguous, a hundred votes depend on the decision; the point is not touched in Mr. Cockburn's very short Commentary on the Act; it has escaped Mr. Rogers; Mr. Finnelly is silent; Messrs. Russell and Rowe have propounded no opinion; and in referring to the Act itself, the words "penal sum of five hundred pounds," in section 76, are constantly catching his eye, and shaking his self-possession. After hesitating some time between the obvious intention of the legislature and the language in which they have expressed themselves, he decides for the former or the latter without assigning any reasons, if he is a



prudent judge ; and the next vote is called on amid the unsuppressed clamours of the disappointed parties. On his arrival in London, at some future period, he will have the satisfaction of finding that Mr. —, in Yorkshire, and Mr. —, in Cumberland, have decided the same point exactly the other way. Some pettifogging attorney, some miserable slaughterer of his own mutton, who feels assured that he argued the point in the most clear and convincing manner, brings an action, under section 76, for a wilful contravention of the provisions of the Act. To meet this very possible case, we recommend the Barrister in Eyre to employ some ready writer to take accurate notes of all proceedings in his court ; for if he take notes himself, it will be no good in an action for the penalty (£500), that he is enabled to refresh his own memory as to the evidence laid before him, or the arguments pressed upon his notice.

For some farther difficulties likely to arise in the barrister's administration of the Act, we refer him to a short dramatic sketch of the proceedings in his Court, drawn, by anticipation, some months since in our 14th number. Those difficulties for the most part remain ; but we forbear to repeat them, and shall now point out to his notice, in the order in which they occur in the Act, a few questions of construction, for which, it strikes us, he ought to be prepared. As to the amount of his work, and the number of disputed votes he will be called upon to decide, this will altogether depend upon the manner in which the overseers and town-clerks discharge their respective duties ; if these examine minutely into the various circumstances of the qualification, viz. not only the amount of value but the period of holding, the payments of rates, assessment, &c., the total of claims and objections will probably be a small one ; on the other hand, should inquiries of this kind be found impracticable, either claims or objections will abound, according as the lists are made out on an exclusive or inclusive system. Mr. Rogers has well described this dilemma, in page 71, et seq. of his edition of the Act, and the course which he thinks the overseers ought to pursue. It will be seen that the above observation applies only to boroughs.

We will first direct the barrister's attention to section 18, a most important section, the history of which is curious. The object was to diminish the evil arising from the arbitrary creation of fictitious votes by landed proprietors, in the shape of rent-charges, or annuities for life, charged upon freehold lands. Section 18, as originally introduced, raised the life-freeholds to be created in future to £10, as the necessary amount to give a vote in the election for knights of the shire. The members for counties corporate are not knights of the shire, yet, in these small counties it is, that the evil of such fictitious votes is most severely felt; accordingly, in the next edition of the bill, words are introduced expressly extending this provision to counties of cities and towns. In this state it went into the House of Lords, where extreme tenderness having been evinced by several peers, in behalf of such 40s. freeholders for life as should not be open to the imputation of being fictitious, Lord Brougham promised a saving clause should be introduced in their favor: and it was introduced in these terms—"except such person shall be in the *bonâ fide* occupation of such lands or tenements, or except the same shall have come to such person by marriage, marriage settlement, devise, or promotion to any benefice or to any office." Now rent chargers and annuitants vote in virtue of the word "*tenement*," which is held to include that kind of incorporeal estate which they possess; they were required also by the old law to be, or rather to say that they were, in receipt of the proceeds of their estate; qu.? therefore, whether this must not be held according to the terms of the exception, a *bonâ fide* occupation of the tenement in respect of which they claim, and whether this section, as it now stands, makes any change in the conditions of this franchise. The question, in other words, will be, whether the term "*occupation*" can apply to such a tenement as a rent-charge, or whether it must be held applicable only to corporeal hereditaments. In our version of the New Testament, the master, in delivering the ten talents, says, "Take these and occupy till I come." If there be no definition in law, which restrains this term from being applicable to rent, the actual receipt of the rent by the rent-charger, will probably be held to satisfy the

words "bonâ fide occupation," and the vote be as admissible as before. This amendment was stated by Lord John Russell to be the only one of importance the Lords had introduced into the Bill; in that case they might as well have left it alone altogether, or at least have adhered to the terms of the amendment as originally suggested by the Law Magazine, No. 15, p. 137; another deviation from which consists in omitting the word "descent;" it not being observed, we presume, that an estate pur autre vie, may come to a person by that operation of law.

We will now compare the same section (18) with section (31) and consider the result as it affects the right of voting for a freehold in counties of cities and towns. The former section concludes with this proviso: "Provided always that nothing in this *Act* contained shall prevent any person now seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold lands or tenements, in respect of which he now has, or but for the passing of this Act, might acquire the right of voting in such respective elections, from retaining or acquiring, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the respective provisions hereinafter contained." The word "Act," in the above proviso, seems to have been used at random, or rather by mistake, for "section," or "enactment;" for we find section 31 of the same Act disfranchising all freeholders, whether in fee or for life, in counties of cities and towns, who shall not have been resident for the six months next previous to the 31st July in each year in such city or town, or within seven statute miles thereof. The intention of the legislature could scarcely be, that this latter provision should not apply to freeholders for life, and yet the word "Act," in the provision above quoted, seems to have that effect. We find also, in section 31, the following words, "Provided always, that nothing in this enactment contained shall be deemed to vary or abridge the provisions hereinbefore made, relative to the right of voting for any city or town being a county of itself, in respect of any freehold for life or lives:" alluding plainly to the provisions of section 18, one of which (above cited,) establishes

persons now seised of life-estates in the possession of the franchise. If this view be correct, the result of the two sections will be, that freeholders in fee will not be able to vote for counties of cities and towns unless they reside within seven miles, whereas the freeholders for life, rent-chargers, annuitants, "and such small gear," may come to the poll from the uttermost ends of the earth.

We have neither space nor leisure to enter at much length into the many questions of difficulty which must necessarily arise in bringing the present Act of Parliament to amalgamate with the old law of elections; we shall content ourselves with enumerating briefly a few which seem to us most worthy of attention.

The question of what will be deemed a good residence for six months is one open to much doubt and inquiry, both as regards the manner of it, and the continuity of time required, and the way in which the distance is to be measured.

The important word "building," introduced into section 27, in the House of Lords, seems almost too comprehensive to admit of any distinctions; yet where several horizontal sections of a house are exclusively occupied by different persons, not answering at the same time to any of the descriptions specified in the Act of "warehouse, counting-house, or shop," it may be doubted whether each several occupation, though of sufficient amount, will confer the franchise.

The payment of all rates and assessed taxes *payable* before a day certain in each year;<sup>1</sup> the demand to be rated, where landlord is also liable, and tender of payment in such cases, are provisions under which various matter for dispute and judicial interpretation must arise.

In cases where the receipt of the rents and profits of the estate during six months previous to 31st July, is necessary

<sup>1</sup> It appears already that much exclusion is likely to ensue this first year of registration, from the impossibility of collecting before the 20th July all rates and taxes payable before the 6th April last. The words of the Act are "*previously to the 5th of April*;" only therefore the assessments due the previous Michaelmas need be paid. The party, however, must be rated to the poor in every rate made for the whole year up to 31st July; and have paid all *payable* up to the 6th of April.

to the exercise of the franchise, will it be necessary to have actually received the last half year's rent due?

Will the old election law respecting joint-tenancies and equitable estates of freehold apply to the new franchises of copyhold and leasehold introduced by this Act?

By section 7 we find it provided that the Boundary Act, "when passed, shall be deemed and taken to be part of this Act, as fully and effectually as if the same were incorporated herewith." Again, section 33 provides that "every person *now* having a right to vote, &c." shall retain such right for life on certain conditions. Under these two sections then a question arises, whether new freeholders, burgage-tenants, or other voters of an ancient class, are introduced into the constituency by the Boundary Act, so as to be entitled to retain their votes for life under the reservation clause—a question depending on the construction of the word "*now*."

We long to know how the writs to the sheriff and the præcipes of that officer will designate the members to be elected for the new boroughs. The act itself calls them "members to sit in Parliament:" differing in that expression from every other act which has either conferred this privilege of returning members, or modified it in any respect.—See 27 Henry VIII., cap. 26, relating to new members for Monmouth; 34 and 35 Henry VIII., cap. 13, "An Act for making Knights and Burgesses within the County and City of Chester;" 25 Charles II., cap. 9, "An Act to enable the County Palatine of Durham to send Knights and Burgesses to Parliament;" the various Acts passed in the reign of George III. relative to New Shoreham, Coventry, Cricklade, and Aylesbury; in all of which the privilege is called that of returning burgesses or citizens, as the case may be. By the more ancient acts, above-cited, it appears that the word "burgess," includes citizen; but the question now arises, whether it can be applied also to the members for the new boroughs, many of them not having charters or corporations. The expression seems to have been avoided in this act, under the apprehension that it could not be so applied. If this be so, we have now, in addition to knights, burgesses, and barons of the Cinque Ports, a fourth distinct class, to be designated only by the generic term of "members to sit in

Parliament." We should not have entered into this question, had not more depended on it than the terminology of the sheriff's writ. The two acts, 9 Anne, cap. 5, and 33 George II., cap. 20, upon which the pecuniary qualifications of members to sit in Parliament at present depends, designate such members as knights of the shire, citizens, burgesses, and barons of the Cinque Ports, and apportion the amount accordingly; will then these acts, by virtue of section 75 of this act, which declares all election laws now in force shall be applicable to the new boroughs, be held to apply to a class of members which was not in existence at the time of the passing of those acts?

Should this question be decided in the affirmative, we have still another doubt to propound respecting the qualifications of these new members. The act of Anne made it necessary only that the qualifying estate should be in possession, and the oath relative to that fact taken by the member, at the time of election, and the intent of the act was therefore easily evaded by means of temporary transfers of property; to meet which practice it was enacted by 33 Geo. II. that before taking their seats members should produce and deliver to the clerk of the House a signed statement of the qualifying estate, and take the oath relating thereto in the presence of the speaker. This latter act, therefore, relates not to the election of the member, but to a proceeding subsequent, namely, the taking his seat in the House, and applies at this moment, it should seem, only to the members for such counties, cities, boroughs, or cinque ports as then existed; for the words of section 75 in the present act are, "that all laws, statutes, and usages now in force respecting *the election* of members to serve in parliament, &c. shall be and remain in full force, and shall apply to *the election* of members to serve in parliament for all counties, &c. hereby empowered to return members," &c.

Hence the qualification of the new members is controlled only by 9 Anne, and not by 33 Geo. II., and will be liable, therefore, to the same evasive proceeding which the latter act was passed to prevent.<sup>1</sup>

<sup>1</sup> This would be, perhaps, an important question, if the law relating to the qualification of members were not altogether a dead letter.

We mention these several points merely as seeming to us debatable on the first view, without sufficiently inquiring into them to form an opinion one way or the other; and we now hasten in conclusion to express our sincere wish that the process of registration may be found in practice more free from difficulty and embarrassment than we have ever thought there was reason to anticipate. The effect to be produced by it in shortening the duration of elections is an admirable object; but we fear that too sanguine expectations have been entertained of this result in limiting the period of polling in all cases to the space of two days. When a candidate, with little hope of final success, has made a run at first, as it is called, every manœuvre will of course be employed to make the polling on the other side as slow as possible; and the three questions allowed to be asked of every voter by the returning officer, on a requisition to that effect, will afford great opportunity for delay, where so many votes as six hundred have to be polled in one place. Besides, it will surely be competent to raise arguments on the answers in some cases; and counsel, be it observed, are not excluded from the polling place, although they are from the court of revision. For instance, to the third question:—"Have you the same qualification for which your name was originally inserted in the register of voters now in force for, &c.?" a man may answer specially to the effect, that he has the same property, but that since the 31st July he has incurred some disqualification. Whether under such circumstances he should be allowed to vote, is a question admitting much discussion on both sides. We find, indeed, two learned gentlemen, who have written commentaries on the act, expressing opinions directly at variance on that very point; Mr. Rogers in p. 18 of his treatise, and Mr. Rowe, p. 74.

We shall observe with attention and anxiety the working of this act during this first, and far most troublesome, year of registration, and hope, by the kindness of some of our friends, to be able to give a better account of its practical operation than the general opinion, as well as our own, appears to anticipate.

P.

# DIGEST OF CASES.

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## COMMON LAW.

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[Containing 2 Barn. and Adol. Part 3; 8 Bing. Parts 3 & 4; 2 Crompton & Jarvis, Part 2; and the first number of Dowling's Reports of Cases in the King's Bench Practice Court,<sup>1</sup> which we distinguish by the letters D. P. R. The last number of Moore & Payne's Reports contains no case not contained in former Digests.]

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### ABATEMENT.

(*Peerage.*) A plea in abatement by an earl, on the ground of his not being sued as such by his title, must allege positively that he was an earl and had the title claimed at the suing out of the writ. It is not enough that this may be collected by inference.—*Rigby v. Alexander*, 8 Bing. 416.

### ACT OF PARLIAMENT.

1. (*Construction.*) Certain duties were imposed by a harbour act on copper, iron, lead, tin, and pewter, and *all other metals* not enumerated: Held, that gold and silver, being generally described by name, or as *the precious metals*, were not included.—*Casher v. Holmes*, 2 B. & Adol. 592.
2. Where two acts are repugnant, that which received the royal assent last must prevail.—*Rex v. Inhabitants of Middlesex*, D. P. R. 116.

### AFFIDAVIT OF DEBT.

1. (*By foreigner—variance with process.*) It is no objection to an affidavit by a foreigner that it was interpreted to him in his own language by the plaintiff's attorney, and that the jurat did not state the interpreter to be acquainted with the language: Held also, that it was no objection that the process described the plaintiff as suing in his own right, and the affidavit set out a debt due to him in his representative character.—*Marzetti v. Jouffroy*, D. P. R. 41.

<sup>1</sup> These Reports are very well executed, and are likely to prove extremely useful to the profession, but the names of the parties in many of the cases are wanting.—  
Edit.



2. (*On articles.*) An affidavit of debt on articles of agreement must state the consideration.—*Walker v. Gregory*, D. P. R. 24.
3. (*On award.*) An affidavit of debt on an award ought to state that the money was due "at a day now past."—*Anonymous*, D. P. R. 5.
4. (*On note—bad for part.*) An affidavit bad as to part, (as for two out of three promissory notes,) is bad for the whole. An affidavit should state when the note is payable, or that it is overdue. (2 M. & S. 148.)—*Kirk v. Almand*, 3 C. & J. 354.
5. (*On bond.*) An affidavit on a bond stated that the defendant had bound himself in £20 as liquidated damages, and that the defendant had broken the same by neglecting to make certain payments: Held, that it should be shown that default had been made to the amount of £20 to authorise an arrest.—*Chambers v. Ward*, D. P. R. 137.
6. (*On bill of exchange.*) An affidavit of debt on a bill of exchange need not state for what it was drawn, but merely what is due upon it.—*Harley v. Morgan*, 2 C. & J. 331.
7. (*Bill of exchange.*) An affidavit of debt on a bill of exchange by indorsee must state by whom the bill was indorsed. It is sufficient to state the amount due, without stating the amount of the bill.—*Lewis v. Gompertz*, 2 C. & J. 352.
8. (*On bill of exchange.*) In an affidavit of debt by indorsee against drawer, the default of the acceptor must be shown.—7 Bing. 251.

#### ANNUITY.

(*Memorial.*) The plaintiff had agreed with the defendant to pay off an annuity formerly granted to N. P. by the defendant, and make him a farther advance. By an annuity deed made in pursuance of this agreement, the defendant, in consideration of a sum certain paid by the plaintiff, covenanted to pay him a certain annuity, and assigned certain dividends as a security. The deed also contained a covenant, that if the defendant should at any time leave the country, thereby putting the plaintiff to extraordinary expense in insuring the defendant's life, the plaintiff should be entitled to retain out of the overplus dividends enough to cover the expenses. The deed contained no notice of N. P.'s annuity; but the defendant as soon as he received the consideration money, paid back to the plaintiff the requisite money for redeeming that annuity, and the plaintiff immediately paid it to N. P. In the memorial, under the head "nature of the instruments," were inserted the words "assignment of dividends and annuity deed to secure the same:" Held, that this was a sufficient description, and that there was no necessity to mention N. P.'s annuity or the above covenant in the memorials. (S. B. Moore, 63; 2 B. & C. 251; 6 B. & C. 366.)—*Cane v. Lovelace*, 2 B. & Adol. 767.

#### APPEAL.

(*Costs when abandoned.*) Where an appeal against a poor rate has been entered and abandoned, the respondents are entitled to costs up to the

time of the abandonment. (D. & R. 445.)—*Ex parte Holloway*, D. P. R. 26.

And see MANDAMUS.

### APOTHECARY.

The defendant was apprenticed to his brother, an apothecary, who had a shop at H., but resided and practised eight miles from H, but he often came to H., and was consulted by the defendant as to patients there. The defendant visited and gave medicine to patients at H.; but he never received any thing, and his brother was paid for the medicine: Held, that this was a practising as an apothecary within 55 G. 3. c. 194, sufficient to render the defendant liable for the penalties. Lord Tenterden, C. J. remarked—"We think the only safe rule is to confine the practice of apprentices to the residence of their master, whereby the patients may in general have the benefit of his skill." (1 C. & P. 264.)—*Apothecaries' Company v. Greenwood*, 2 B. & Adol. 700.

### APPRENTICE.

(*Justices' allowance.*) Under 56 G. 3, c. 139, s. 2, the justices have a general discretion to determine on the fitness of the binding after taking all circumstances into account. They are not confined to the consideration of the fitness of the master and proposed apprentice.—*The King v. Mills*, 2 B. & Adol. 578.

### ARBITRATOR.

(*Charges of.*) A cause was referred to three persons. One declined joining in the award from conscientious motives. The award directed that the costs of the award should be paid in equal moieties. The two arbitrators who made the award having been paid for the making of the award: Held, that the third had no remedy against the party for his services. Taunton, J. intimated an opinion that the services of an arbitrator were honorary, and that he could not bring an action for his fees.—*Burroughes v. Clarke*, D. P. R. 48.

And see AWARD.

### ARREST.

1. (*In wrong county.*) To set aside an arrest on the ground of its being in a wrong county, there must be an affidavit that it was not on the border, and that there is no dispute as to boundaries.—*Webber v. Manning*, D. P. R. 24.
2. (*Privilege.*) The defendant was returning home after being tried and acquitted at the Old Bailey upon a charge of stealing money, when he was arrested for the same money: the Court held that he was not privileged.—*Anonymous*, D. P. R. 157.
3. The affidavit of debt was for goods and money lent. The declaration contained no count for goods: the Court refused to interfere.—*Gray v. Harvey*, D. P. R. 114.

### ASSURANCE.

1. (*On ship.*) In an action on a policy on ship, boat, tackle, &c. evidence of a usage not to pay for boats slung on the outside was held inadmissible;

Held also, that upon the construction of the clause "free from average under £3 per cent.," the underwriter is liable for every instance of damage, however small, if the aggregate amount to £3 per cent. (4 Taunt. 367.)—*Blackett v. Royal Exchange Assurance Company*, 2 C. & J. 244.

2. (*Delay*.) A policy was effected on a yacht from Bristol to London in January. The yacht did not sail till the end of May: Held, that the delay was unreasonable, and that the circumstance of the vessel's being a yacht, which is understood to sail only in summer, did not alter the case.—*Palmer v. Marshall*, 8 Bing. 317.

#### ATTORNEY.

1. (*Costs*.) During part of the time, the cause was conducted by a person who was not an attorney, but a certificated attorney afterwards undertook it: Held, that the defendant could raise no objection on this ground. (3 Bing. 9.)— *v. Sexton*, D. P. R. 180.
2. (*Delivering up deeds*.) The Court will not compel an attorney to deliver up deeds on which he has a lien for payment of what is due, it not appearing that he came by them tortiously.—*In the matter of Millard*, D. P. R. 140.
3. (*Privilege*.) The K. B. will relieve an attorney of that court arrested on C. P. process.—*Anonymous*, D. P. R. 3.
4. (*Privilege*.) An attorney suing an attorney for a sum not exceeding £5 for a cause of action within the jurisdiction of the London Court of Conscience, is not entitled to his costs.—*Burn v. Pasmore*, D. P. R. 17.
5. (*Striking off the roll*.) The mere fact of an attorney having been convicted of a conspiracy, is not a ground for striking him off the roll.—*Re ———*, D. P. R. 174.
6. (*Summary jurisdiction over*.) The Court will not compel an attorney, who has advanced money on bills deposited with him, to account for the residue.—*Exp. Schwalbanker*, D. P. R. 182.
7. (*Taxing bill*.) The Court will refer an attorney's bill to be taxed as a matter of course after it has been paid, if the application be within a reasonable time. It is not necessary to show fraud or imposition.—*Glascott v. Castle*, 2 C. & J. 355.
8. (*Taxation of costs*.) A special agreement as to costs is not binding on the Master on taxation. The attorney may charge for perusing an abstract submitted to counsel.—*Drux v. Scroope*, D. P. R. 71.
9. (*Taxation of costs*.) An attorney's bill contained charges for journeys at the rate of five guineas a day besides expenses. These being objected to before the Master, it was answered that the client had expressly agreed to this rate of charging. After hearing conflicting affidavits, the Master allowed the charges. The taxation was finished in November, 1830, and the amount paid on the 13th of that month. In Easter term, 1831, a rule was obtained, calling on the Attorney-General to show cause why it should not be referred to the Master to revise his taxation. Per Lord Tenterden, C. J.—"No agreement of this kind, even with reference to journeys, can

be absolutely binding; the Master must still exercise his judgment as to the propriety of allowing the charges according to the circumstances laid before him. And if it had appeared in this case that the Master had thought no discretionary power was left him, and that he was precluded by the agreement from entering into the consideration upon which the charges were made, there would have been ground for the present motion. But this is not shown. And besides, the client comes for relief several months after the money has been paid upon the Master's allocatur, and when the attorney has paid over part of it to his agent, who has left the country. Under these circumstances, without establishing any precedent for other cases, I think the rule ought to be made absolute."—*Drax v. Scroope*, 2 B. & Adol. 581.

10. (*Undertaking by.*) An undertaking by an attorney, not in the cause, will not be summarily enforced.—*Walker v. Aslett*, D. P. R. 61.
11. (*Striking off the rolls.*) A motion to strike an attorney off the rolls, on the ground of his having practised for himself during the last two years of his clerkship away from his master's place of residence, was refused after he had been three years and a half on the rolls, though said to be a sufficient ground for opposing his admission. (1 Bing. 160.)—*In the matter of ———, gent., one, &c.* 2 B. & Adol. 766.

And see MAGISTRATE—PRACTICE—PRODUCTION OF DEED.

#### AWARD.

1. A submission leaving the action and the subject-matter thereof, and the issue therein, and the costs, to the arbitrament, final end, and determination of a barrister, does not authorise him to order a verdict to be entered up.—*Hutchinson v. Blackwell*, 8 Bing. 351.
2. The defendant paid money into court in an action for fixtures relinquished by the plaintiff, but before the cause was brought to issue, the parties, by a submission which did not mention costs, appointed arbitrators "to balance their accounts, and settle all matters in dispute respecting the leaving and occupying of two corn mills and a dwelling-house." The arbitrators ordered the defendant to pay a sum beyond that he had paid into court, and that each party should pay his own costs: Held, that the plaintiff was entitled to his costs upon taking the money out of court. Gazelee, J. doubted.—*Stratton v. Green*, 8 Bing. 437.
3. A verdict was taken, subject to an award as to damages to be made within a certain time. The arbitrator accidentally omitted to enlarge the time, and the defendant's attorney refused to allow of the enlargement; the object being to gain time till the defendant should return to England according to a promise given by him, and release his bail from liability. The Court ordered that the plaintiff should enter up judgment forthwith, unless the defendant consented to an enlargement of the time; but ordered that no proceedings should be taken to fix the bail until the ensuing term. The rule was made absolute without costs. (4 B. Moore, 3; 1 B. & C. 68.)—*Taylor v. Gregory*, 2 B. & Adol. 774.

4. (*Interest on.*) Interest is recoverable on money ordered to be paid by an award, but it cannot be proceeded for by motion for an attachment. (3 Camp. 468.)—*In the matter of arbitration between Churcher and Stringer*, 2 B. & Adol. 777.

## BAIL.

1. (*Acceptor of bill.*) The acceptor of a dishonoured bill, on which the action was brought, is not competent to become bail.—*Anonymous*, D. P. R. 183.
2. (*Affidavit of sufficiency.*) If an affidavit of sufficiency be good according to the old rule, it is sufficient, notwithstanding the rules of Trinity Term 1831.—*Anonymous*, D. P. R. 115.
3. (*Affidavit of sufficiency.*) An affidavit of sufficiency stating that the bail had money in the funds, is not enough; it should state in what fund.—*Anonymous*, D. P. R. 159.
4. (*Cancelling of bond.*) The Court will not order the bail bond to be delivered up to be cancelled on the ground that the process was general and the affidavit stated the special character (executor) of the plaintiff.—*Isley v. Isley*, 2 C. & J. 330.
5. (*Costs of justification.*) Bail having been opposed on the ground of a defect in the notice, and further time for inquiry given: Held, that the defendant was not entitled to notice of justification.—*Anonymous*, D. P. R. 126.
6. (*Deposit in lieu of.*) When money is deposited in lieu of bail, under 7 and 8 Geo. 4, c. 71, the plaintiff, on recovering, is obliged to take it out of Court, and limit his execution to so much of his damages and costs as may remain unsatisfied.—*Hews v. Pyke*, 2 C. & J. 359.
7. (*Description.*) *Manufacturer* is not a sufficient description of bail.—*Fearnley's bail*, D. P. R. 40.
8. (*Description.*) Bail must swear themselves *housekeepers*; *householders* is not sufficient.—*Anonymous*, D. P. R. 127.
9. (*Description of property.*) Where the property described is not sufficient, the Court will not allow the bail to justify in respect of other property, until the defendant has paid the costs of the opposition.—*Jackson's bail*, D. P. R. 172.
10. (*Disqualification.*) Keeping a gambling house is not a ground for rejecting bail, and the costs of justification were allowed.—*Anonymous*, D. P. R. 160.
11. (*Indemnity.*) A bail who had received no undertaking, but expected that the attorney in point of honour would indemnify him, was rejected.—*Anonymous*, D. P. R. 1.
12. (*Justifying by affidavit.*) If bail justify by affidavit, the notice should be accompanied by a copy of the affidavit, or by the original.—*West v. Williams*, D. P. R. 162.

13. (*Leaseholder.*) A leaseholder, not a householder or freeholder, cannot justify.—*Smith's bail*, D. P. R. 1.
14. (*Notice of justification.*) The notice of justification need not state the residence of the bail during the last six months, if stated in the notice of bail.—*Higg's bail*, D. P. R. 124.
15. (*Notice of justification.*) Notice of justification stated that bail would justify for three of the defendants; held good for two.—*Denton and others*, D. P. R. 2.
16. (*Notice of justification.*) The rule, Trinity Term 1 Wm. 4, which enables a defendant to put in and justify bail upon giving four days' notice, does not take away the power of prisoner to put in and justify on a two days' notice, as before the rule.—*Davies v. Grey*, 2 C. & J. 309.
17. (*Notice.*) Notice of bail on 30th January last omitted to describe the bail as freeholders or householders, as required by the rule of Trinity Term, 1831: Held, that this did not authorize an assignment of the bail bond. It was said that objections of this nature should be made when the bail appear.—*Bell v. Foster*, 8 Bing. 334.
18. (*Notice.*) Where a bail has had two places of residence during the six months, it is only necessary to state one.—*Anonymous*, D. P. R. 159.
19. (*Notice.*) The notice need only state the residence of the bail during the last six months. It is not necessary to state that he had actually resided there during the whole of the time. The fact of his being a housekeeper must be stated in the notice as well as in the affidavit.—*Anonymous*, D. P. R. 160.
20. (*Number increased.*) Where the defendant was poor, and the sum sworn too large, the Court allowed three bail to justify instead of two.—*Easter v. Edwards*, D. P. R. 39.
21. (*Qualification.*) A householder of Scotland lodging in England was refused.—*Anonymous*, D. P. R. 61.
22. (*Servant of Ambassador.*) The domestic servant of a Foreign ambassador was refused.—*Locke's bail*, D. P. R. 122.

And see PRACTICE.

## BANKRUPT.

1. (*Contingent debt provable.*) The husband covenanted by marriage settlement to cause £4000 to be paid to his wife's trustees within twelve months after his death, with interest from his death; in trust to pay the interest to his wife for her life in case she survived him, and after her death in trust to pay and assign the money and interest to and between the children, and if no children, to the survivor of the husband and wife. The provision to be in lieu of dower. Held, that this was a debt on a contingency provable under a commission of bankrupt against the husband. (The proof was rejected by the Commissioners; their decision was reversed by the Vice-Chancellor; and his Honour's decision was reversed by Lord Lyndhurst, when Chancellor. The above judgment was

delivered by Tindal, C. J., who with Littledale, J. sat as assistant to Lord Brougham.) *Ex parte Tindal*, 8 Bing. 402.

2. (*Depositions evidence.*) The construction of the 92d section of the Bankrupt Act (6 G. 4, c. 16, s. 92,) is, that where, in the event of there being no bankruptcy, the bankrupt could have maintained an action, and where no such notice as is prescribed in the section has been given, the depositions are to be received as conclusive evidence.—*For v. Mahoney*, 2 C. & J. 325.
3. (*Estoppel by proving.*) By 49 G. 3, c. 121, it was enacted, that the proving or claiming a debt should be deemed an election to take the benefit of a commission with respect to the debt so proved or claimed. Plaintiff proved under a commission in 1816: Held, that though 49 G. 3 was repealed by 6 G. 4, c. 16, (the last Bankrupt Act,) the estoppel remained, and that the plaintiff could not sue for the debt so proved. (6 Bing. 576.)—*Adams v. Bridger*, 8 Bing. 315.
4. (*Keeping house.*) Evidence was given that a creditor having called, was told that S., a trader, was not at home; and that another creditor calling at the same time and being clamorous, S. was seen peeping over his wife's shoulder, whilst she was endeavouring to appease the creditor. A third creditor proved that he was told S. was not at home, though he saw him in the shop: Held, that it was properly left to the jury to say whether this was a keeping house or secluding himself, so as to constitute an act of bankruptcy.—*Key v. Shaw*, 8 Bing. 329.
5. (*Prior commission.*) The defendant justified the taking of the plaintiff's goods under a commission of bankruptcy against L., alleging that the plaintiff had obtained the goods from L. under a fraudulent bill of sale. It appearing that there was a prior commission against L. still in force: Held, that the justification was not maintainable. (7 B. & C. 684; 10 B. & C. 427; *Ex parte Welsh Mont. R. in Bank.* 276.)—*Nelson v. Cherrill*, 8 Bing. 316.
6. (*What passes to Assignees.*) Assignees of a bankrupt may recover unliquidated damages for the breach of a contract broken before the bankruptcy. The contract was for the delivery of stone.—*Wright v. Fairfield*, 8 B. & Adol. 727.
7. (*What provable.*) The defendant in an action for a libel compromised the action by agreeing to apologise and pay the plaintiff's costs. The costs were taxed, and he paid part of the costs, but was committed under an attachment as for a contempt for the non-payment of the rest. He afterwards became bankrupt: Held, that the costs constituted a debt provable under the commission. (1 Gl. & Jac. 261; 9 B. & C. 652.)—*Riley v. Byrne*, 2 B. & Adol. 779.
8. (*What passes to Assignees.*) The bankrupt had entered into possession upon a stipulation for a future lease and to pay rent in the interim. The superior landlord distrained on the bankrupt for rent due from his (the bankrupt's) lessor, being much more than was due from the bankrupt: Held, that a right of action for damages thereby accrued to the bankrupt,

and passed to his assignees : Held also, that the bankrupt's lessor, having distrained upon him for rent was estopped from denying that the relation of landlord and tenant existed between them.—*Hancock v. Caffin*, 8 Bing. 358.

9. (*Where landlord discharged from covenants with.*) In a lease from defendants to A., they covenanted that they would take certain fixtures at such price as two competent persons should appraise them at, one to be named on each side. A. became bankrupt, and the assignee declined the lease, which was delivered up : Held, that as (under 6 G. 4, c. 16, s. 75,) the lessor could not have maintained an action for the breach of the covenant against the assignee, the assignee could not sue the lessor upon it.—*Kearsey v. Carstairs*, 2 B. & Adol. 716.

And see EVIDENCE, 2.

### BENEFIT SOCIETY.

Since 9 G. 4, c. 92, no action is maintainable against the trustee of a benefit society. The remedy, in case of dispute, is by reference, as pointed out by the 45th section.—*Crisp v. Bunbury*, 8 Bing. 394.

### BY-LAW.

A by-law, the effect of which was to elect a master of a company from amongst other persons than directed by the charter, was held bad. It was also held bad on another ground, namely, that it delegated to a select body the power given by the charter to the corporation at large, on condition that the select body should elect in a particular mode not directed or sanctioned by the charter. (6 T. R. 752; 4 B. & C. 787.)

### CERTIORARI.

(*Where granted.*) The Court will not grant a certiorari to remove a warrant of distress to levy poor's rates.—*Exp. Taunton*, D. P. R. 54.

### CHARITABLE USES.

(*What within the Statute of.*) A pauper being in custody for leaving his wife and children chargeable to the parish, conveyed, by indenture, to the parish officers, for sixty years, should he so long live, an estate in trust for the churchwardens and overseers of the poor and inhabitants of the parish for the time being, to the intent that the rent and profits might be paid and applied for their use and benefit in aid of the poor rate : Held, that the indenture (though not void as against 5 Geo. 1, c. 8, nor as executed under duress,) was void under 9 Geo. 2, c. 36, requiring all deeds to charitable uses to be enrolled, for default of enrolment, and that a party to the deed was not estopped from saying that it was void.—2 B. & Adol. 518, 544.)—*Doe dem. Price v. Howells*, 2 B. & Adol. 744.

### CHURCH.

1. (*Charge on living.*) A clergyman granted, by indentures, three several annuities, chargeable upon his living, and by the same indentures granted the living to a trustee as a security. By way of collateral security, he gave three warrants of attorney, with defeasances in the common form and containing nothing to shew that they were intended to bind the living :



Held, that these warrants could not be set aside as charges on the living within 13 Eliz. c. 20.—(10 B. & C. 241; 8 T. R. 300, 411; 8 East, 231.) *Gibbons v. Hooper*, 2 B. & Adol. 734.

2. Where, however, the warrant of attorney recited the charge, and judgment was entered up, and execution (by sequestration) issued for arrears of the charge, the Court set aside the execution.—*Kirlew v. Batts*, 2 B. & Adol. 736, note.

#### COGNOVIT.

(*Payment.*) Where a *cognovit* is given for the payment of a sum generally, the defendant may pay either the plaintiff or his attorney.—*Anonymous*, D. P. R. 173.

#### COPYHOLD.

(*Fine on admittance.*) No fine is due on the admittance of a remainderman, after admittance of and payment of a fine by tenant for life, unless there be a special custom for it. The main question in the case, was whether a great quantity of documentary evidence produced established such a custom. The Court held that it did not.—*The Dean and Chapter of Ely v. Caldecott*, 8 Bing. 439.

#### COURT OF REQUESTS.

In an action for a sum under £5., the balance of £17. due on a bill of exchange: Held, that it was a case within the jurisdiction of the Halifax Baron Court.—*Walker v. Watson*, 8 Bing. 414.

#### COURT OF REQUESTS. (*Bath.*)

The residence of the defendant in Bath was held to entitle him to enter a suggestion to deprive the plaintiff of costs, though the plaintiff resided, and the cause of action arose out of the jurisdiction.—*Graham v. Browne*, 2 C. & J. 327.

#### COUNTY PALATINE.

(*Practice.*) The service of the *lūtūt* is sufficient, and that of the *mandate* not necessary.—*Griffin v. Higgin*, D. P. R. 45.

#### COVENANT.

(*Trustees.*) The defendant, by his marriage settlement, covenanted with the trustees to pay off certain mortgages on the settled estates within a year from the marriage. The mortgages not being paid off, the trustees, ten years after the marriage, brought an action of covenant. No special damage was proved to have resulted from the breach, and all interest had been paid. Judgment was suffered to go by default, and on the execution of a writ of inquiry, nominal damages were found. The Court set aside the inquisition, holding that the trustees were entitled to recover damages to the full amount of the unpaid mortgages.—*Lethbridge v. Mytton*, 2 B. & Adol. 772.

#### DESCRIPTION OF PREMISES.

The question in the case named below was, whether certain lands passed under any of several long descriptions in deeds and recoveries. It esta-

blishes no principle, and does not admit of being abstracted.—*Doe dem. Meyrick v. Meyrick*, 2 C. & J. 223.

## DEVISE.

1. (*Description of lands.*) The lands in question had been purchased by the deviser in October, 1800. The will was made in February, 1801; and the deviser died the same year. The lands were intermixed with the ancient family estate of the testator, and the gamekeeper of the manor of B. had been in the habit of shooting over them. The devise was of "all that my manor or reputed manor of B., (the family estate,) with the mansion house called B. Court thereunto belonging, and also all and singular my freehold messuages, lands, &c. *thereunto belonging*, situate in the parish of B. M. and B. G." The lands in question were situate as required, but were not strictly a part of or appurtenant to the manor of B.: Held, that as it appeared from the rest of the will that they were intended to pass, the words *thereunto belonging* were sufficient to carry them. The case was decided with peculiar reference to the wording of the will.—*Doe dem. Gore v. Langton*, 2 B. & Adol. 680..
2. Testator devised certain messuages to trustees, in trust "for such son of mine, by my present wife, as shall first attain the age of twenty-one years, as and when such son shall attain such age, and for his heirs; but in case I shall depart this life without leaving a son, or leaving such, none shall live to attain the age of twenty-one years, then in trust for my daughter, if she shall live to attain the age of twenty-one years, and her heirs. But should I depart this life without leaving issue, then I give and devise the same in trust for N. L. and his heirs." The testator left one child, a daughter, who died, without issue, under the age of twenty-one: Held, that N. L. took nothing under the devise.—*Doe dem. Rew v. Lucraft*, 8 Bing. 386.
3. The testator, after some pecuniary legacies, devised as follows: "The rest of my estate, the two houses, situate, &c. I give to my loving wife, and after her decease, the one to my daughter, the other between my two sons:" Held, that the daughter took an estate in fee in the house devised to her.—*Gall v. Esdaile*, 8 Bing. 323.
4. B. devised to his only son E. for life, remainder to E.'s first and other sons successively in tail male. Remainder to the daughters of his said son; and in case of his son's death without issue, to any other sons the testator might have, in tail male. Remainder to his daughters in tail, and ultimately to his own right heirs. The estates were charged with sums to his daughters. The daughters suffered recoveries to the use of E., and by a subsequent act of parliament, reciting the will and the recoveries, and that E. had no issue, the trustees were empowered to sell the estates devised, and lay out the money in other estates, to be settled to such of the uses in the will as should be existing, undetermined or capable of taking effect, at the time of the sale. The trustees sold, and purchased an estate, which was conveyed to them to such uses as last mentioned: Held, that they took a fee by the conveyance.—*Wortham v. Mackinnon*, 8 Bing. 564.

**EJECTMENT.**

1. (*Service of Declaration.*) A declaration and notice had been nailed upon the door after the servant had refused to open the door and receive it, and the wife of the tenant came the next day to the party serving it, and requested to know what she was to do with it. He recommended her to go to the lessor's attorney, and she said she would recommend her husband to do so: Held not sufficient.—*Doe dem. Briggs v. Roe*, 2 C. & J. 202.
2. (*Service.*) Service on a book-keeper of a company on part of the premises which he occupied, is sufficient.—*Doe v. Roe*, D. P. R. 23.
3. (*Service.*) Service on the wife of the tenant in possession in a shed adjoining the premises, was held sufficient.—*Doe v. Roe*, D. P. R. 67.
4. (*Service.*) Held, that the landlord could not declare in ejectment as of Trinity Term under 11 G. 4, & 1 W. 4, c. 70, s. 36, if his title accrued after the essoign day, the 19th of May. The intermediate days are a *casus omissus* in the statute.—*Doe v. Roe*, D. P. R. 79.
5. (*Striking out party.*) The court allowed a party's name to be struck out of the consent rule, on an affidavit that he was in possession of no part of the premises, and upon his undertaking to permit execution as to any of them.—*Doe dem. Snape v. Snape*, 2 C. & J. 214.
6. (*Subscription.*) An attorney subscribed a declaration in a common ejectment in the manner pointed out by 11 G. 4, & 1 W. 4, c. 70, s. 36: Held no irregularity.—*Anonymous*, D. P. R. 18.
7. (*Undertaking by tenant.*) The tenant in possession is not compellable to give the undertaking required by 1 G. 4, c. 87, s. 1, where the title is disputed.—*Doe dem. Saunders*, D. P. R. 4.

And see LANDLORD AND TENANT.—PRISONER.

**ESTOPPEL.** See CERTIORARI.

**EXECUTION.**

The plaintiff may sue out execution against the goods of the defendant in custody on mesne process without discharging him.—*Jones v. Tye*, D. P. R. 181.

**EVIDENCE.**

1. (*Of wife.*) To negative a pauper's marriage by evidence of a prior existing marriage, it was proved that, the pauper being a Protestant and Mary B. a Catholic, they went in 1826 before Mr. W. a clergyman residing in Dublin, who, in his private house, read to them the marriage ceremony, and asked of her if she would be the wife of the pauper, and of the pauper whether he would be her husband, to which each answered, I will, and that they subsequently cohabited for two months and upwards: Held 1, that this was a valid marriage. 2. That Mary B. was admissible to prove the facts, though her husband, the pauper, had before given evidence of a subsequent marriage (2 T. R. 263; 6 M. & S. 194.) 3. That a document purporting to be letters of orders, found among Mr. W.'s papers at his death, and more than 80 years old, were admissible as evidence of his

- being a clergyman, without proof of the handwriting or seal of the archbishop who granted the order. (As to the validity of such marriages see Jacob's edition of *Roper's Law of Husband and Wife*, vol. 2, Addenda, No. 1, p. 445.)—*The King v. Inh. of Bathwick*, 2 B. & Adol. 689.
2. (*Bankrupt.*) In an action on a promissory note given by the defendants as sureties for one T. since become bankrupt: Held, that T. was inadmissible to prove that the note was given for a usurious consideration, even though a general release had been given him by the defendants. It was held that a release from them to the assignee of all claims on the estate, and a release by the bankrupt of his claim to a surplus, were also necessary. (1 B. & C. 444.)—*Perrymann v. Steggall*, 8 Bing. 369.
3. (*Declarations of shopman.*) The declarations of a shopman are not admissible unless made in the ordinary course of his employer's business. (10 Ves. 128.)—*Garth v. Howard*, 8 Bing. 451.
4. (*Letter from wife, in action of crim. con.*) In an action of crim. con. a letter from the wife to a third person is admissible to prove the feelings of the wife towards the husband, although the letter state a fact (the readiness of the wife to convey property for her husband's benefit), that could not have been given in evidence. (4 Esp. 39; 1 B. & Ald. 90.)<sup>1</sup>—*Watts v. Bernard*, 8 Bing. 376.
5. (*When parol evidence admissible.*) The assignment of an indenture of apprenticeship stated that E. D. consented to receive the pauper in consideration of a certain sum paid him by the former master: Held, that parol evidence was admissible to shew that this was parish money, and therefore that the instrument did not require a stamp. (8 T. R. 379; 3 B. & A. 382.)—*The King v. Inh. of Llangunna*, 2 B. & Adol. 616.

And see *SHERIFF*, 5.

## FEE.

(*Of Exchequer Clerk in Court.*) The term fee of a clerk in court of the Exchequer in a revenue prosecution is 3s. 4d., and he is entitled to charge it where only a *spá. ad resp.* has issued.—*The Attorney General v. Munday*, 2 C. & J. 347.

## FEME COVERT.

Where a married woman has obtained credit by calling herself single, the Court will not relieve her from arrest.—*Hall v. Barber*, D. P. C. 8; *Simon v. Winnington*, D. P. C. 16.

## FINE.

(*Description of premises.*) The fine was of a moiety of thirty messuages, forty cottages, thirty gardens, and four acres of land. At the time of the fine levied the estate consisted of about four acres of land, on which were

<sup>1</sup> A singular argument was used in this case by Serjeant Spankie: "Voltaire, no mean authority for the springs of human action, describes a lady as earnestly and successfully importuning a minister for the promotion of her husband, although her attentions were by no means confined to him alone." *Le monde comme il va. Vision de Babouc.* The incident alluded to has been recently dramatised in France.

forty-nine houses and two or three cottages. The whole number of cottages not exceeding the number mentioned in the fine, and a cottage being a small dwelling-house, held that the estate passed by it.—*Doe dem. Young v. Sotherton*, 2 B. & Adol. 628.

#### FOREIGN JUDGMENT.

In an action brought against the captain of a king's ship, upon the judgment of the Vice-Admiralty of Malta, for damages awarded by that Court, by the personal representative of the original plaintiff, after the lapse of twenty-two years, the plaintiff was nonsuited, on the ground that, as the proceedings were set out, it did not clearly appear that the defendant was within the jurisdiction, nor that proper proceedings had been pursued.—*Obicini v. Bligh*, 8 Bing. 335.

2. By a decision of the Court of Commerce at Lyons, confirmed by a Cour Royale (Court of Appeal), the defendant had been discharged from all liability: Held, that, as this decision proceeded on an erroneous notion of what the law of England was upon the subject, the defendant was still liable in an English Court. (1 Camp. 63; 4 B. & C. 625.) The misapprehension of the French Court was in considering that the cancellation of an acceptance by mistake, which acceptance was afterwards renewed, was a giving time to the acceptor, and a consequent discharge of the other parties. (3 B. & C. 428.)—*Novelli v. Rossi*, 2 B. & Adol. 757.

#### HEIR.

(*Liability for debt of ancestor.*) Debt against coheiresses on the bond of their ancestor. Plea, *riens per descent*. Replication, (under 3 & 4 W. & M. c. 14,) that the defendants had lands by descent, &c., concluding with a verification. The jury assessed the damages under the assignment of breaches at more than the value of the lands they found to have descended: Held, that the plaintiff could not levy to a greater amount for debt and costs than the value of the lands descended.—*Brown v. Shuker*, 2 C. & J. 311.

#### ILLEGAL TRANSACTION.

(*Liability destroyed by.*) The defendants being sued as proprietors by the printer of a weekly paper; Held, that an affidavit made by the plaintiff at the Stamp Office of his being the sole proprietor, was a bar to the action, as well for printing advertising cards as for printing the work itself.—*Stephens v. Robinson*, 2 C. & J. 209.

#### INDICTMENT.

(*For destroying manufactures.*) An indictment for feloniously destroying warps of linen was held good, without alleging that they were goods in any process of manufacture, or prepared for or employed in carding, spinning, weaving or manufacturing goods within the terms of 7 & 8 G. 4, c. 30.—*The King v. Ashton*, 2 B. & Adol. 750.

And see LUNACY.

#### INFERIOR COURT.

Where one only of two defendants sued in the Lord Mayor's Court has been arrested, the cause cannot be removed into the K. B. without bail being put in for both.—*Jameson v. Schonswar*, D. P. R. 175.

## INSOLVENT.

It is a good plea to an action against the marshal for an escape, that he discharged the prisoner at the end of a given time by the order of the Insolvent Court, without showing that the Insolvent Court had jurisdiction. The 7 G. 4, c. 57, s. 81, was referred to by the judges as decisive on the point.—*Saffery v. Jones*, 2 B. & Adol. 598.

## INSURANCE.

(*Freight.*) The plaintiff, a London merchant, was the agent of two Spanish merchants residing in and subjects of Buenos Ayres. The plaintiff effected in his own name for them at Lloyd's a policy of insurance (in the common form) on specie shipped in the L. in the river Plate, and on the same or the returns thereof (as interest might appear) in any description of merchandize, with liberty to declare and value thereafter, at and from the said river to Canton. The defendant was one of the underwriters. The policy was effected in October, 1825. The Spanish merchants chartered the vessel in June, 1825, for a voyage from Buenos to Canton and back, on an agreement to pay for the voyage 10,000 dollars in the manner following: viz. in China, all sums that might be necessary for the payment of port charges and other incidental expenses, (the latter not exceeding 2,000 dollars,) and the balance at thirty days after the vessel's return to Buenos Ayres. Buenos Ayres is a port in the river Plate. The underwriters had no notice of the terms of the charter party. The Spanish merchants having so chartered the L., shipped on board her at Buenos Ayres a quantity of specie, consigned to their agent at Canton, to be invested in produce to be returned to them. The ship arrived at Canton, and the specie was delivered to the agent, who repaid the captain the port charges paid by him at Canton, and a further sum for other necessary expenses. The agent invested the remaining specie (after deducting these payments) in tea, and consigned it to his principals at Buenos Ayres. The ship was captured, and the tea lost. No declaration or valuation was ever made upon the policy: Held, that the payment made by the agent at Canton could not be considered as part of the goods, and that the underwriters were not liable in respect of them. Lord Tenterden (who referred to several foreign works in the course of his judgment) added: "Our opinion on this case will have no effect on the question whether the payment on the shipment of goods can be added to their price, so as to form part of their value in an open policy, if ever that question should arise." (12 East, 639, 1 B. & Adol. 45.)—*Winter v. Haldimand*, 2 B. & Adol. 649.

2. (*Of ship—stranding.*) Taking the ground from the ebbing of the tide is not *stranding*. Thus, where the running tackle broke whilst the ship was settling, and she notwithstanding took the ground precisely in the place intended, but struck against some hard substance and injured her bottom: Held, that this was not a stranding within the usual memorandum by which corn, &c. was warranted free from average, unless general, or the ship stranded. (2 B. & A. 315; 5 B. & A. 225.)—*Kingsford v. Marshall*, 8 Bing. 458.

## INTEREST.

In an action for breach of covenant in not paying a sum of money with interest, the defendant paid money enough into Court to cover the interest down to the commencement of the action, but not enough to cover interest down to the time of payment, and pleaded *solvit ad diem*: Held, that the plaintiff was entitled at the trial to recover interest down to the time of payment into Court. (2 Burr. 1077.)—*Kidd v. Walker*, 2 B. & Adol. 705.

## INTERROGATORIES.

(*Commission for.*) A commission to examine witnesses under 1 W. 4, c. 22, will not be granted, unless some person before whom the examination is wished to take place, be named.—*Doe dem. Thorn v. Phillips*, D. P. R. 56.

## JUDGMENT.

(*Docketing.*) Docketing of the issue, though a common practice, is not a docketing of a judgment within 4 & 5 W. & M. c. 20.—*Braithwaite v. Watts*, 2 C. & J. 318.

## LANDLORD AND TENANT.

The 1 G. 4, c. 87, requiring tenants to give security in certain cases, applies only to cases where the tenancy, if by lease, has expired by effluxion of time, or, if by a yearly tenancy, has expired by a regular notice to quit.—*Doe dem. Tendal v. Roe*, D. P. R. 143.

And see PRODUCTION OF DEED.

## LIBEL.

(*Pleading.*) The action was brought for an alleged accusation of felony contained in a newspaper paragraph, headed *horse-stealing*, and setting forth that the plaintiff had been apprehended for that offence under certain circumstances of suspicion. The innuendo was: "then and there including and meaning that the plaintiff had been guilty of feloniously stealing a horse." Plea, justifying the libel with the exception of the word *horse-stealing*: Held bad, on the ground that if the words did not amount to a charge of felony, the defendant would have succeeded on the general issue, but that if they did impute an actual felony, a justification merely alleging circumstances of suspicion was no answer. Littleale, J. considered it bad on the ground that the defendant in such a case could not excuse parts of a libel. Lord Tenterden and Patke, J., however, seemed to think that a part of a libel might be justified separately from the rest. (7 East, 493; 6 Bing. 587.)

## LONDON.

(*Paving Act.*) The Paving Act, 57 G. 3, c. 29, does not extend to any turnpike road, nor to any street or public place which was not paved before the passing of the act or before the commissioners began to do any act with respect to it.—*Loveridge v. Hodsoll*, 2 B. & Adol. 602.

## LUNACY.

(*Indictment for false certificate.*) An indictment charged that the defendant, a surgeon, knowingly and with intention to deceive, signed a certificate of lunacy without having visited or personally examined the patient, contrary

to the statute, &c. The signing of such certificate without such personal examination being made an offence by the act independently of intention: Held, that the allegation of intention might be rejected as surplusage. (Stark. on Ev. Part 4, p. 1586.)—*The King v. Jones*, 2 B. & Adol. 611.

### MAGISTRATE.

(*Right of persons to appear as counsel before.*) Every Court has the power to regulate its own proceedings, and declare what (or whether any) persons shall act as advocates therein: Held, therefore, that the justices were justified in turning an attorney out of a police office on his persisting to take part in the proceedings as an attorney or advocate for the accused, on the hearing of an information. It was admitted that any person, whether a professional man or not, may attend as the friend of either party, take notes, quietly make suggestions, and give advice. (*Cox v. Coleridge*, 1 B. & C. 37.)—*Collier v. Hicks*, 2 B. & Adol. 663.

### MANDAMUS.

The Court of Quarter Sessions confirmed an order of removal, subject to a case for the opinion of the K. B. The justices could not agree on the case for five or six sessions. It appearing that the appellants had not been guilty of the delay, the Court granted a *mandamus* to the justices to enter continuances and hear the appeal.—*Re v. Just. of Suffolk*, D. P. R. 163.

MARRIAGE. See EVIDENCE, 1.

METAL. See ACT OF PARLIAMENT.

### MISNOMER.

1. The Court refused to discharge a defendant who had been arrested by the name of William Henry M. instead of William Hamilton M., it being sworn that the defendant had told the plaintiff that his name was William Henry M. and signed an agreement by that name.—*Newton v. Maxwell*, 2 C. & J. 215.
2. Where the writ was against C. Hooper and the notice directed to C. Wood, proceedings were set aside with costs.—*Wright v. Hooper*, 2 C. & J. 236.

### MORTGAGE.

(*Lease by mortgagor and mortgagee.*) The mortgagee demised, and the mortgagor demised and confirmed, and the power of re-entry for breach of covenants was reserved to them or either of them: Held, that the re-entry enured for the benefit of the person having the legal estate (the mortgagee), and that an ejectment not containing a demise by him solely, was insufficient.—*Doe dem. Barney v. Adams*, 2 C. & J. 232.

### OUTLAWRY.

The Court refused to set aside an outlawry on the ground of the plaintiff's having appeared at different public places during the proceedings, it appearing that he had notice of the proceedings in outlawry. (2 Wils. 127.)—*Johnson v. Driver*, D. P. R. 127.

And see PRACTICE, 31.



## PARLIAMENT.

(*Privilege of member.*) If a defendant be elected Member of Parliament between perfecting bail and final judgment, the bail may have an *exoneretur* entered on the bail-piece, and this, though a *cognovit*, given with the consent of the bail, had prevented the plaintiff from compelling a render before the election.—*Phillips v. Wellesley*, D. P. R. 9.

## PAPER BOOKS.

Four paper books will be henceforth sufficient. None is required for the fifth judge.—D. P. R. 80.

## PARENT AND CHILD.

A *habeas corpus* was issued to remove a female infant from the custody of the mother to that of the father, though there was no allegation of improper treatment on her part.—*Exp. McClellan*, D. P. R. 81.

## PARTICULAR OF DEMAND.

1. Where the particular exceeded three folios, the Court held that the defendant was entitled to full particulars on paying the expense, he having made affidavit that he had received only general accounts.—*James v. Child*, 2 C. & J. 252.
2. The plaintiffs sued the defendant in an action for goods sold and delivered. The demand was for spirits, but the particular stated it as a demand for goods sold by the plaintiffs in their business as brewers. One of the plaintiffs, besides his partnership with the other as spirit merchant, carried on business with another person as brewers. It clearly appearing that the defendant was aware of the real character of the demand: Held, that the particular was sufficient. Parke and Gaselee, Js. assented, but expressed doubts as to the propriety of the decision.—*Lambirth v. Roff*, 8 Bing. 411.
3. A mistake in a date was held immaterial in a particular, where it was evident that it could not mislead; and disbursements were held recoverable under an item for *cash advanced*. (2 Taunt. 224; 1 Camp. 68.)—*Harrison v. Wood*, 8 Bing. 371.

## PARTNERSHIP.

S. and S. carried on business as brewers. W. advanced them £24,000, and a partnership deed was executed between the three, whereby a partnership stock was created, but W., instead of an aliquot portion of the profits, was to receive £2000 or £200 a year, according to circumstances, out of the clear profits. W.'s name did not appear: Held, that W. was a partner; and, the new firm becoming bankrupts, Held, that the creditors of the old firm of S. and S., as well as the creditors of the new firm, were entitled to prove against the property of the new firm, on the ground of S. and S. being the apparent owners of that property within the 72d section of the Bankrupt Act.—*Exp. Chuck*, 8 Bing. 469.

PAYMENT INTO COURT. See INTEREST.

PLEADING. See INSOLVENT.—LIBEL.

**PEER.**

(*Service of process.*) Service of a summons at a peer's residence whilst he was in France was held sufficient.—*Anonymous*, D. P. R. 81.

**PERPETUITY.**

(*What power within.*) A power of sale to be exercised by the trustees of a settlement, with the consent of the tenant for life, and after his death at the discretion of the trustees for the time being, was held to enable the trustees, with the consent of the tenant for life, to make a valid assurance of the premises.—*Boyce v. Hanning*, 2 C. & J. 334.

**PLEADING.**

(*Case for maliciously suing out commission.*)—Case for maliciously suing out a commission of bankrupt. Plea, not guilty. The declaration not averring that the commission had been superseded: Held, that the plaintiff might be nonsuited at the trial, and that it was not necessary for the defendant to demur. (7 Taunt. 399.)—*Whitworth v. Hall*, 2 B. & Adol. 695.

**POOR.**

(*Irish.*) An Irish pauper being pregnant, was at her own request admitted into the workhouse of a parish in England, and was there delivered of a bastard child: Held, that she was removable, if chargeable to the parish, as soon as conveniently may be after the delivery, but that the child, being settled where born, was not removable. (See 59 G. 3, c. 12, s. 33; and 4 B. & A. 298.)—*The King v. Benett*, 2 B. & Adol. 713.

And see **APPEAL**.

**PRACTICE.**

1. (*Security for Costs.*) The Court held an application to compel an indigent relator in *quo warranto* to give security for costs, too late after similiters had been added by the defendants themselves.—*Rex v. Day*, D. P. R. 32.
2. (*Security for Costs.*) The defendant pleaded after he knew the plaintiff to be abroad: Held, that he could not afterwards require security for costs.
3. (*Security for Costs.*) Where the defendant resides abroad the plaintiff may obtain a rule for compelling security for costs without giving notice to the defendant's attorney, but in that case it will be without a stay of proceedings.—*Jones v. Jones*, 2 C. & J. 207.
4. (*Payment of Costs.*) The payment of interlocutory costs, awarded for not proceeding to trial on a former occasion, was held not to be a condition precedent to the trial of a cause.—*Wilson v. Collins*, 8 Bing. 374.
5. (*Costs.*) Costs are never allowed on showing cause on notice; nor (adds the reporter) where cause is shown in the first instance.—*Anonymous*, D. P. R. 148.
6. (*Costs at Chambers.*) A judge at chambers will not grant costs, though possibly invested with the power. (This was laid down as a rule by the four judges.)—*Anonymous*, D. P. R. 52.

7. (*Costs on Discontinuance.*) Taxation of costs, without payment, is not a discontinuance.—*Edginton v. Proudman*, D. P. R. 152.
8. (*Variance between Process and Declaration.*) The process stated the debt as due to the plaintiff's executors, &c. not as executors, &c. The declaration was as in his own right: Held, no variance.—*Executors v. —*, D. P. R. 97.
9. (*Service of Demand of Plea.*) Where the party is not an attorney, service by sticking up in the K. B. office held insufficient.—*Anonymous*, D. P. R. 68.
10. (*Pendency of Suit.*) In an action commenced by serviceable process, an order for particulars was made, which had the effect of staying proceedings. Two terms after the suing out of the first process, the plaintiff proceeded by arrest. The Court refused to order the bail-bond to be given up, but discharged a rule obtained for that purpose without costs, on the terms of the plaintiff undertaking to discontinue the first action and deliver particulars.—*Anonymous*, D. P. R. 59.
11. (*Suit pending.*) Pendency of suit may be pleaded, if the plaintiff sues out bailable process, without discontinuing serviceable process sued out for the same cause.—*Prescott v. Stevens*, D. P. R. 57.
12. (*Particulars—Time to Plead.*) Unless an order for time to plead state that it is to be after delivery of particulars, the time will run though no particulars are given.—*Adams v. Drummond*, D. P. R. 99.
13. (*Waiver of Irregularity.*) An irregularity may be waived, but a nullity cannot. The want of an affidavit was held to make a plea in abatement a nullity.—*Garratt v. Hooper*, D. P. R. 28.
14. (*Waiver of Irregularity—Habeas Corpus.*) After seven years' lying by, the defendant cannot set aside an execution in 1811 on a judgment of 1824, on the ground that no *sci. fa.* had been sued out. Though the judgment be against several, the *habeas corpus* is applicable to those only who are in custody.—*Wilson v. Bacon*, D. P. R. 118.
15. (*Waiver of Irregularity.*) The declaration was indorsed conditionally, but the notice was of its having been filed absolutely. The defendant having taken it out of the office, held that the irregularity was waived.—*Gilbert v. Kirkland*, D. P. R. 153.
16. (*Waiver of Irregularity.*) The defendant does not waive an irregularity on the part of the plaintiff by asking time.—*Anonymous*, D. P. R. 23.
17. (*Waiver by Delay—Entry of Committitur.*) After two years and a half it is too late to object that the defendant was charged in custody under an attachment of privilege, without leave of the Court or a judge. Where a defendant is committed under a *habeas corpus* to the custody of the marshal, it is not necessary to enter a *committitur* piece on the judgment roll.—*Goodman v. —*, D. P. R. 128.
18. (*Judgment for want of Plea.*) After time for pleading had expired, but before judgment was actually signed, the plaintiff's attorney was told that a plea had been delivered. He having subsequently signed judgment, the

Court set it aside, and made him pay the costs. *Amphill v. Semple*, 2 C. & J. 358.

19. (*Affidavit on Judgment as in case of a Nonsuit.*) The affidavit, in moving for judgment as in case of a nonsuit, stated, that the plaintiff replied, and that the cause was *thereby* at issue. Held insufficient, the affidavit should be that the cause is at issue.—*Smyth v. Parslow*, 2 C. & J. 217.
20. (*Bringing Money into Court.*) If, on perfecting special bail, the defendant wishes to take out money brought into Court under 7 & 8 Geo. 4, c. 71, s. 2, he must do so before issue joined. If paid in after an act of bankruptcy, it is not within the 6 Geo. 4, c. 16, ss. 81, 82, (the Bankrupt Act,) and the assignees are not entitled to take it out.—*Ferrall v. Alexander*, D. P. R. 132.
21. (*Amendment.*) The power to amend given by 14 E. 3, st. 1, c. 6, and 9 H. 5, st. 1, c. 4, is confined to misprisions of officers of the Court coming within the description of clerk. After error brought, therefore, the Court refused to allow a plaintiff in replevin, who had pleaded two bad pleas, to withdraw a judgment in his favour, and plead *de novo*. (See the case, 3 Bing. 92.)—*Green v. Miller*, 2 B. & Adol. 781.
22. (*Entitling Affidavit.*) Affidavits to found a motion to stay proceedings upon a bail bond, may be entitled either in the original action or in the action against the bail.—*Leyles v. Chetwood*, 2 C. & J. 332.
23. (*Entitling Affidavit.*) A rule nisi to set aside a writ of false judgment was obtained on an affidavit entitled *Watson v. Walker*. Walker being the plaintiff upon the writ of false judgment, the Court discharged the rule with costs.—*Watson v. Walker*, 8 Bing. 315.
24. (*Non Pros.*) The plaintiff's attorney, in order to prevent a *non pros* for want of a declaration, which the defendant was in a condition to enter up, obtained a rule to discontinue upon payment of costs, and gave notice of an appointment to tax them; but on the expiration of the rule, instead of paying the costs or entering a discontinuance, served the defendant with a declaration. The defendant upon this entered up judgment of *non pros*, which the Court refused to set aside, but gave the plaintiff the option to proceed upon payment of all costs incurred by the defendant.—*Ariel v. Barrow*, 8 Bing. 375.
25. (*Testing Ca. Sa.*) If judgment of a term previous to the trial be entered by consent, the *ca. sa.*, in proceeding against the bail, may be tested as of that term.—*Hocenden v. Crowther*, D. P. R. 170.
26. (*Cancelling Bail Bond.*) A defendant with two Christian names was arrested under process containing only the initial of one. The Court cancelled the bail bond.—*Ogden v. Barker*, D. P. R. 125.
27. (*Bail in Error.*) The Court refused further time to put in bail in error on the ground that the original bail had been claimed by the defendant in error and withdrawn.—*Anonymous*, D. P. R. 32.
28. (*Warrant of Attorney.*) On a motion to enter up judgment on a warrant of attorney more than a year old, Held, that the attesting witness

should join in the affidavit, and that it was not enough for him to sign his name to the affidavit as commissioner before whom it was sworn.—*Field v. Bearcroft*, 2 C. & J. 217.

29. (*Return of Languidus*.) If the sheriff returns *languidus*, he should show that he was prevented by the party's illness from producing him at the return of the writ.—*Perkins v. Meacher*, D. P. R. 21.
30. (*Signing Judgment for Irregularity*.) The defendant pleaded without having entered an appearance: Held, that this did not entitle the plaintiff to sign judgment before the time for pleading had expired.—*Nolleken v. Severn*, 2 C. & J. 333.
31. (*Service of Process*.) In the Court of Exchequer (where there is no outlawry<sup>1</sup>), the Court refused to rule that service on the wife of one of the defendants, who was abroad, should be deemed good service, unless the other defendants would undertake not to plead in abatement, saying that the plaintiff should proceed in a court where he might proceed to outlawry.—*Davies v. Morgan*, 2 C. & J. 237.
32. (*Changing the Venue*.) The defendant cannot change the venue after an order for time to plead on the usual terms; but in such order he might have inserted a special saving of the application. (3 Price, 3.)—*Notts v. Curtis*, 2 C. & J. 345.
33. (*Demand of Plea*.) Process served on the 4th November—declaration *de bene esse* delivered on the 10th, indorsed "the defendant to appear and plead hereto in eight days." The defendant having appeared on the 18th, Held, that he was entitled to a demand of plea.—*Willett v. Wilson*, 2 C. & J. 356.
34. (*Error in Process*.) The writ required the defendant to appear on Tuesday, the 15th of April, there being no such day. The notice, however, stated the appearance day to be Friday, the 15th of April: Held sufficient.—*Willan v. Collics*, D. P. R. 35.
35. (*Entitling Declaration*.) George the Fourth having died during a Trinity Term, Held, that a declaration of that term was properly entitled Trinity Term, 1 W. 4.—*Anonymous*, D. P. R. 4.
36. (*Executor's Accounts*.) The Court granted a motion to enlarge a rule calling on an executor to deliver in his accounts, though his affidavits had been only one day on the file.—*Att. Gen. v. Jeyes*, 2 C. & J. 352.
37. (*False Plea*.) To debt on judgment, the defendant pleaded a release dated December, 1831, destroyed by accident. On an affidavit that it was false, the Court allowed the plaintiff to sign judgment as for want of a plea. If it had been a plea on which only one issue could have been taken, it seems the decision would have been different. (4 Bing. 412; 5 B. & A. 750.)—*Smith v. Hardy*, 8 Bing. 435.
38. (*Increasing Issues on Distringas*.) The Court of Exchequer will not increase issues upon a *distringas* at common law since 7 & 8 Geo. 4, c. 7,

<sup>1</sup> The Uniformity of Process Act (2 W. 4, c. 39,) places all the Courts on a par in this respect.

but if the common law course remains, will leave the plaintiff to act upon it if he thinks fit. (1 C. & J. 548.)—*Watson v. Locke*, 2 C. & J. 203.

39. (*Meaning of Peremptorily.*) *Peremptorily* only means that the party can take out no more rules for time to do the particular act.—*Gray v. Pennell*, D. P. R. 120.

40. (*Notice of Trial.*) In all cases of peremptory undertaking the plaintiff should be bound to give a fresh notice of trial, though the cause is in the paper.—*Salsh v. Cranbrook*, D. P. R. 148.

And see COUNTY PALATINE.—PARLIAMENT.—PARTICULAR OF DEMAND.—PRODUCTION OF INSTRUMENT.—PROMISSORY NOTE.—BAIL.—MISNOMER.

#### PRODUCTION OF DEED.

1. The Court will not compel an attorney to give up his own marriage settlement, though drawn by himself, and though he took no interest under it. (4 B. & Ald. 47.)
2. Where a lease is in the hands of a tenant, and no counterpart can be found, the landlord is entitled to inspect it and take a copy.—*Doe dem.* — *v. Slight*, D. & R. 163.
3. Where the plaintiff had lost his part of an agreement, the Court compelled the defendant's attorney to produce the other part, though not held on any trust for the plaintiff.—*Neale v. Swind*, 2 C. & J. 278.

#### PREBEND (*Advowson belonging to*).

Where the church becomes vacant during the life of a prebendary, but he dies without presenting, the presentation belongs to his personal representative: Held by six judges out of eight who delivered their opinions in the House of Lords. (S. C. 3 Bing. 223; 7 B. & C. 113.)—*Mirchouse v. Rennell*, 8 Bing. 490.

#### PROCESS (*ac etiam*).

An *ac etiam* omitting the words "on promises" is nugatory. It seems that in such a case the Court would not reduce a recognizance given under arrest for a greater sum than £40 to that sum.—*Anonymous*, D. P. R. 155.

2. (*Mistakes in.*) A quo minus was directed to the sheriff of London, and the notice directed the party to appear on the 11th of January, 1831, then past: Held not sufficient ground for setting it aside, and that the copy served need not contain the signature of the clerk of the pleas.—*Clutterbuck v. Wiseman*, 2 C. & J. 213.
3. (*Return.*) Where a party sues out a *fi. fa.* first, a *ca. sa.* cannot issue till after the return of the *fi. fa.* to the Court. The indorsement by the sheriff of what he had done, and sending it to the plaintiff, is not a return.—*Lawes v. Codrington*, D. P. R. 30.

#### PRISONER.

1. (*Discharge.*) A defendant is entitled to his discharge under 48 Geo. 3, c. 123, after being twelve months in prison for the nominal damages in ejectment under £20, although the property recovered be of great value.—*Doe v. —*, D. P. R. 69.

2. (*Discharge.*) A prisoner for a debt under £20 was discharged under 48 Geo. 3, c. 123, though he had refused to deliver his schedule under the Lords' Act.—*Exp. White*, D. P. R. 66.
3. (*Discharge.*) A defendant had given a warrant of attorney for more than £20, though the original debt was less: Held not entitled to his discharge under 48 Geo. 3, c. 123. (6 Moore, 287.)—*White's case*, D. P. R. 19.
4. (*Discharge.*) A prisoner in custody under an attachment for non-payment of costs under £20, is not entitled to his discharge within 48 Geo. 3, c. 123.—*Doe dem. Upton v. Benson*, D. P. R. 15.
5. (*Discharge.*) Under 48 Geo. 3, c. 123, a man who was imprisoned on the 26th November would be entitled to his discharge on the 25th of the November following.—*Anonymous*, D. P. R. 150.

#### PROMISSORY NOTE.

1. (*Consideration.*) The notes in question had been obtained by threats of opposing the maker's (an insolvent's) discharge. One of them being in the hands of an indorsee, and the maker having been arrested on it, the Court cancelled the bail-bond, but refused to compel the other notes to be delivered up, though in the hand of the original payee, an attorney, he holding them as a private creditor.—*Kay v. Masters*, D. P. R. 86.
2. (*What is.*) Assumpsit on the following instrument: "On demand we promise to pay Mr. G. C. or order, £200, for value received in stock of ale, &c. this being intended to stand against me, the undersigned Mary P., as a set off for that sum left me in my father's will above my sister Ann's share." Signed by Mary P. and her husband, the defendant. It appeared that this note was given at the request of G. C., the father of Mary P. and the plaintiff in the cause, to save him the trouble of altering his will; but the relationship was not alleged in the declaration: Held, that this not being a note payable at all events, the plaintiff was not entitled to recover. (2 Camp. 205; 4 Camp. 127; 4 M. & S. 25.)—*Clarke v. Percival*, 2 B. & Adol. 660.

#### ROYAL GRANT.

James I. granted to R. T., his heirs and assigns, a town, manor, and hundred, with appurtenances, and also free warren in all their demesne lands in the same, and in all other lands and woods being in the same hundred: Held, that the term *demesne lands* meant the lands of the manor which the lord held in his own lands, and that the words *other lands* meant the lands other than demesne of R. T.; that the grant, therefore, did not extend over the crown lands within the hundred.—*The Att. Gen. v. Parsons*, 2 C. & J. 279.

#### SCIRE FACIAS.

1. A *sci. fa.* should lie four juridical days in the sheriff's office.—*Fraser v. Miller*, D. P. R. 141.
2. In proceedings by *sci. fa.* Sunday is not to be reckoned.—*Anonymous*, D. P. R. 143.

#### SET-OFF.

(*Costs.*) The trial of an ejectment cause having been put off at the instance

of the defendant, upon his undertaking to pay the costs of the day: Held that the interlocutory costs so due to the lessor of the plaintiff might be set off against the costs on the verdict, which was given for the defendant. *Doe dem. Carter*, 8 Bing. 330.

#### SETTLEMENT.

(*Renting.*) The pauper came to reside on a tenement exceeding the yearly value of £10 on the 1st November, 1813. The bargain with the owner was, that he should live a month in it for nothing on trial, and that if on that trial he liked it, he should take it at Martinmas, at the yearly rent of £14. The pauper resided in it during the month, then took it on the above terms for a year, and resided on it another month, when he left the parish: Held, that the first coming was a "coming to settle" within 13 & 14 Car. 2, c. 12, and that the pauper having resided more than forty days, gained a settlement. (1 B. & C. 531; 1 B. & A. 473; 15 East, 567.)—*The King v. Inhabitants of Helsham*, 2 B. & Adol. 620.

#### SHERIFF.

1. (*Attachment for not bringing in the body.*) The sheriff was served with a rule to return the writ on the 21st November. He made his return as of Michaelmas term. On the 30th November, the plaintiff took out a rule for the sheriff to bring in the body, which was dated as of the last day of Michaelmas term, and served on the 3d December. The Court said that an attachment against the sheriff for not bringing in the body might be taken *cum periculo*.—*Haywood v. Jackson*, 2 C. & J. 208.
2. (*Costs.—Poundage.*) The sheriff is not entitled to his costs under 1 & 2 W. 4, c. 58, s. 6; and the Court required him to pay the proceeds of the seizure in a disputed case into Court, saying, that his right to the poundage would depend on the result.—*Barker v. Dynes*, D. P. R. 169.
3. (*Execution where rent due.—Landlord and tenant.*) After notice that a year's rent is due, which the goods are not sufficient to cover, the sheriff cannot sell, and the Court refused to stay proceedings against a sheriff, who had sold under such circumstances, on his paying over the proceeds.—*Forster v. Hilton*, D. P. R. 35.
4. (*Instructions to.*) The sheriff is not bound to do any thing upon a writ, unless the defendant's place of abode and addition be properly described on it, although he made no objection when it was delivered to him.—*Kenrick v. Nanney*, D. P. R. 58.
5. (*Interest.*) Serviceable process in a cause, to which the sheriff is party, may be directed to him.—*The Mayor, &c. of Kingston-upon-Hull v. Bubb*, D. P. R. 151.
6. (*Where liable for acts of officer.*) In an action against sheriff for extortion, evidence was given that writs generally came into the under-sheriff's office with the name of the officer who was wished to execute it indorsed, and that the officer indorsed was generally adopted, and that if the writ came without such indorsement, it was indorsed there: Held, that the indorsement of a writ was *prima facie* evidence to connect the sheriff with the



## INTEREST.

In an action for breach of covenant in not paying a sum of money with interest, the defendant paid money enough into Court to cover the interest down to the commencement of the action, but not enough to cover interest down to the time of payment, and pleaded *solvit ad diem*: Held, that the plaintiff was entitled at the trial to recover interest down to the time of payment into Court. (2 Burr. 1077.)—*Kidd v. Walker*, 2 B. & Adol. 705.

## INTERROGATORIES.

(*Commission for*.) A commission to examine witnesses under 1 W. 4, c. 22, will not be granted, unless some person before whom the examination is wished to take place, be named.—*Doe dem. Thorn v. Phillips*, D. P. R. 56.

## JUDGMENT.

(*Docketing*.) Docketing of the issue, though a common practice, is not a docketing of a judgment within 4 & 5 W. & M. c. 20.—*Braithwaite v. Watts*, 2 C. & J. 318.

## LANDLORD AND TENANT.

The 1 G. 4, c. 87, requiring tenants to give security in certain cases, applies only to cases where the tenancy, if by lease, has expired by effluxion of time, or, if by a yearly tenancy, has expired by a regular notice to quit.—*Doe dem. Tendal v. Roe*, D. P. R. 143.

And see PRODUCTION OF DEED.

## LIBEL.

(*Pleading*.) The action was brought for an alleged accusation of felony contained in a newspaper paragraph, headed *horse-stealing*, and setting forth that the plaintiff had been apprehended for that offence under certain circumstances of suspicion. The innuendo was: "then and there including and meaning that the plaintiff had been guilty of feloniously stealing a horse." Plea, justifying the libel with the exception of the word *horse-stealing*: Held bad, on the ground that if the words did not amount to a charge of felony, the defendant would have succeeded on the general issue, but that if they did impute an actual felony, a justification merely alleging circumstances of suspicion was no answer. Littledale, J. considered it bad on the ground that the defendant in such a case could not excuse parts of a libel. Lord Tenterden and Parke, J., however, seemed to think that a part of a libel might be justified separately from the rest. (7 East, 493; 6 Bing. 587.)

## LONDON.

(*Paving Act*.) The Paving Act, 57 G. 3, c. 29, does not extend to any turnpike road, nor to any street or public place which was not paved before the passing of the act or before the commissioners began to do any act with respect to it.—*Loveridge v. Hodsoll*, 2 B. & Adol. 602.

## LUNACY.

(*Indictment for false certificate*.) An indictment charged that the defendant, a surgeon, knowingly and with intention to deceive, signed a certificate of lunacy without having visited or personally examined the patient, contrary

to the statute, &c. The signing of such certificate without such personal examination being made an offence by the act independently of intention: Held, that the allegation of intention might be rejected as surplusage. (Stark. on Ev. Part 4, p. 1586.)—*The King v. Jones*, 2 B. & Adol. 611.

#### MAGISTRATE.

(*Right of persons to appear as counsel before.*) Every Court has the power to regulate its own proceedings, and declare what (or whether any) persons shall act as advocates therein: Held, therefore, that the justices were justified in turning an attorney out of a police office on his persisting to take part in the proceedings as an attorney or advocate for the accused, on the hearing of an information. It was admitted that any person, whether a professional man or not, may attend as the friend of either party, take notes, quietly make suggestions, and give advice. (*Cox v. Coleridge*, 1 B. & C. 37.)—*Collier v. Hicks*, 2 B. & Adol. 663.

#### MANDAMUS.

The Court of Quarter Sessions confirmed an order of removal, subject to a case for the opinion of the K. B. The justices could not agree on the case for five or six sessions. It appearing that the appellants had not been guilty of the delay, the Court granted a *mandamus* to the justices to enter continuances and hear the appeal.—*Rex v. Just. of Suffolk*, D. P. R. 163.

MARRIAGE. See EVIDENCE, 1.

METAL. See ACT OF PARLIAMENT.

#### MISNOMER.

1. The Court refused to discharge a defendant who had been arrested by the name of William Henry M. instead of William Hamilton M., it being sworn that the defendant had told the plaintiff that his name was William Henry M. and signed an agreement by that name.—*Newton v. Maxwell*, 2 C. & J. 215.
2. Where the writ was against C. Hooper and the notice directed to C. Wood, proceedings were set aside with costs.—*Wright v. Hooper*, 2 C. & J. 236.

#### MORTGAGE.

(*Lease by mortgagor and mortgagee.*) The mortgagee demised, and the mortgagor demised and confirmed, and the power of re-entry for breach of covenants was reserved to them or either of them: Held, that the re-entry enured for the benefit of the person having the legal estate (the mortgagee), and that an ejectment not containing a demise by him solely, was insufficient.—*Doe dem. Barney v. Adams*, 2 C. & J. 232.

#### OUTLAWRY.

The Court refused to set aside an outlawry on the ground of the plaintiff's having appeared at different public places during the proceedings, it appearing that he had notice of the proceedings in outlawry. (2 Wils. 127.)—*Johnson v. Driver*, D. P. R. 127.

And see PRACTICE, 31.

## PARLIAMENT.

(*Privilege of member.*) If a defendant be elected Member of Parliament between perfecting bail and final judgment, the bail may have an *exoneretur* entered on the bail-piece, and this, though a *cognovit*, given with the consent of the bail, had prevented the plaintiff from compelling a render before the election.—*Phillips v. Wellesley*, D. P. R. 9.

## PAPER BOOKS.

Four paper books will be henceforth sufficient. None is required for the fifth judge.—D. P. R. 80.

## PARENT AND CHILD.

A *habeas corpus* was issued to remove a female infant from the custody of the mother to that of the father, though there was no allegation of improper treatment on her part.—*Exp. M'Clellan*, D. P. R. 81.

## PARTICULAR OF DEMAND.

1. Where the particular exceeded three folios, the Court held that the defendant was entitled to full particulars on paying the expense, he having made affidavit that he had received only general accounts.—*James v. Child*, 2 C. & J. 252.
2. The plaintiffs sued the defendant in an action for goods sold and delivered. The demand was for spirits, but the particular stated it as a demand for goods sold by the plaintiffs in their business as brewers. One of the plaintiffs, besides his partnership with the other as spirit merchant, carried on business with another person as brewers. It clearly appearing that the defendant was aware of the real character of the demand: Held, that the particular was sufficient. Parke and Gaselee, Js. assented, but expressed doubts as to the propriety of the decision.—*Lambirth v. Roff*, 8 Bing. 411.
3. A mistake in a date was held immaterial in a particular, where it was evident that it could not mislead; and disbursements were held recoverable under an item for *cash advanced*. (2 Taunt. 224; 1 Camp. 68.)—*Harrison v. Wood*, 8 Bing. 371.

## PARTNERSHIP.

S. and S. carried on business as brewers. W. advanced them £24,000, and a partnership deed was executed between the three, whereby a partnership stock was created, but W., instead of an aliquot portion of the profits, was to receive £2000 or £200 a year, according to circumstances, out of the clear profits. W.'s name did not appear: Held, that W. was a partner; and, the new firm becoming bankrupts, Held, that the creditors of the old firm of S. and S., as well as the creditors of the new firm, were entitled to prove against the property of the new firm, on the ground of S. and S. being the apparent owners of that property within the 72d section of the Bankrupt Act.—*Exp. Chuck*, 8 Bing. 469.

PAYMENT INTO COURT. See INTEREST.

PLEADING. See INSOLVENT.—LIBEL.

**PEER.**

(*Service of process.*) Service of a summons at a peer's residence whilst he was in France was held sufficient.—*Anonymous*, D. P. R. 81.

**PERPETUITY.**

(*What power within.*) A power of sale to be exercised by the trustees of a settlement, with the consent of the tenant for life, and after his death at the discretion of the trustees for the time being, was held to enable the trustees, with the consent of the tenant for life, to make a valid assurance of the premises.—*Boyce v. Hanning*, 2 C. & J. 334.

**PLEADING.**

(*Case for maliciously suing out commission.*)—Case for maliciously suing out a commission of bankrupt. Plea, not guilty. The declaration not averring that the commission had been superseded: Held, that the plaintiff might be nonsuited at the trial, and that it was not necessary for the defendant to demur. (7 Taunt. 399.)—*Whitworth v. Hall*, 2 B. & Adol. 695.

**POOR.**

(*Irish.*) An Irish pauper being pregnant, was at her own request admitted into the workhouse of a parish in England, and was there delivered of a bastard child: Held, that she was removable, if chargeable to the parish, as soon as conveniently may be after the delivery, but that the child, being settled where born, was not removable. (See 59 G. 3, c. 12, s. 33; and 4 B. & A. 298.)—*The King v. Bennett*, 2 B. & Adol. 713.

And see **APPEAL.**

**PRACTICE.**

1. (*Security for Costs.*) The Court held an application to compel an indigent relator in *quo warranto* to give security for costs, too late after similizers had been added by the defendants themselves.—*Rex v. Day*, D. P. R. 32.
2. (*Security for Costs.*) The defendant pleaded after he knew the plaintiff to be abroad: Held, that he could not afterwards require security for costs.
3. (*Security for Costs.*) Where the defendant resides abroad the plaintiff may obtain a rule for compelling security for costs without giving notice to the defendant's attorney, but in that case it will be without a stay of proceedings.—*Jones v. Jones*, 2 C. & J. 207.
4. (*Payment of Costs.*) The payment of interlocutory costs, awarded for not proceeding to trial on a former occasion, was held not to be a condition precedent to the trial of a cause.—*Wilson v. Collins*, 8 Bing. 374.
5. (*Costs.*) Costs are never allowed on showing cause on notice; nor (adds the reporter) where cause is shown in the first instance.—*Anonymous*, D. P. R. 148.
6. (*Costs at Chambers.*) A judge at chambers will not grant costs, though possibly invested with the power. (This was laid down as a rule by the four judges.)—*Anonymous*, D. P. R. 52.

7. (*Costs on Discontinuance.*) Taxation of costs, without payment, is not a discontinuance.—*Edginton v. Proudman*, D. P. R. 152.
8. (*Variance between Process and Declaration.*) The process stated the debt as due to the plaintiff's executors, &c. not *as* executors, &c. The declaration was as in his own right: Held, no variance.—*Executors v. —*, D. P. R. 97.
9. (*Service of Demand of Plea.*) Where the party is not an attorney, service by sticking up in the K. B. office held insufficient.—*Anonymous*, D. P. R. 68.
10. (*Pendency of Suit.*) In an action commenced by serviceable process, an order for particulars was made, which had the effect of staying proceedings. Two terms after the suing out of the first process, the plaintiff proceeded by arrest. The Court refused to order the bail-bond to be given up, but discharged a rule obtained for that purpose without costs, on the terms of the plaintiff undertaking to discontinue the first action and deliver particulars.—*Anonymous*, D. P. R. 59.
11. (*Suit pending.*) Pendency of suit may be pleaded, if the plaintiff sues out bailable process, without discontinuing serviceable process sued out for the same cause.—*Prescott v. Stevens*, D. P. R. 57.
12. (*Particulars—Time to Plead.*) Unless an order for time to plead state that it is to be after delivery of particulars, the time will run though no particulars are given.—*Adams v. Drummond*, D. P. R. 99.
13. (*Waiver of Irregularity.*) An irregularity may be waived, but a nullity cannot. The want of an affidavit was held to make a plea in abatement a nullity.—*Garratt v. Hooper*, D. P. R. 28.
14. (*Waiver of Irregularity—Habeas Corpus.*) After seven years' lying by, the defendant cannot set aside an execution in 1811 on a judgment of 1824, on the ground that no *sci. fa.* had been sued out. Though the judgment be against several, the *habeas corpus* is applicable to those only who are in custody.—*Wilson v. Bacon*, D. P. R. 118.
15. (*Waiver of Irregularity.*) The declaration was indorsed conditionally, but the notice was of its having been filed absolutely. The defendant having taken it out of the office, held that the irregularity was waived.—*Gilbert v. Kirkland*, D. P. R. 153.
16. (*Waiver of Irregularity.*) The defendant does not waive an irregularity on the part of the plaintiff by asking time.—*Anonymous*, D. P. R. 23.
17. (*Waiver by Delay—Entry of Committitur.*) After two years and a half it is too late to object that the defendant was charged in custody under an attachment of privilege, without leave of the Court or a judge.  
Where a defendant is committed under a *habeas corpus* to the custody of the marshal, it is not necessary to enter a *committitur* piece on the judgment roll.—*Goodman v. —*, D. P. R. 128.
18. (*Judgment for want of Plea.*) After time for pleading had expired, but before judgment was actually signed, the plaintiff's attorney was told that a plea had been delivered. He having subsequently signed judgment, the

Court set it aside, and made him pay the costs. *Amphill v. Semple*, 2 C. & J. 358.

19. (*Affidavit on Judgment as in case of a Nonsuit.*) The affidavit, in moving for judgment as in case of a nonsuit, stated, that the plaintiff replied, and that the cause was *thereby* at issue. Held insufficient, the affidavit should be that the cause is at issue.—*Smyth v. Parlow*, 2 C. & J. 217.
20. (*Bringing Money into Court.*) If, on perfecting special bail, the defendant wishes to take out money brought into Court under 7 & 8 Geo. 4, c. 71, s. 2, he must do so before issue joined. If paid in after an act of bankruptcy, it is not within the 6 Geo. 4, c. 16, ss. 81, 82, (the Bankrupt Act,) and the assignees are not entitled to take it out.—*Ferrall v. Alexander*, D. P. R. 132.
21. (*Amendment.*) The power to amend given by 14 E. 3, st. 1, c. 6, and 9 H. 5, st. 1, c. 4, is confined to misprisions of officers of the Court coming within the description of clerk. After error brought, therefore, the Court refused to allow a plaintiff in replevin, who had pleaded two bad pleas, to withdraw a judgment in his favour, and plead *de novo*. (See the case, 8 Bing. 92.)—*Green v. Miller*, 2 B. & Adol. 781.
22. (*Entitling Affidavit.*) Affidavits to found a motion to stay proceedings upon a bail bond, may be entitled either in the original action or in the action against the bail.—*Leyles v. Chetwood*, 2 C. & J. 332.
23. (*Entitling Affidavit.*) A rule nisi to set aside a writ of false judgment was obtained on an affidavit entitled *Watson v. Walker*. Walker being the plaintiff upon the writ of false judgment, the Court discharged the rule with costs.—*Watson v. Walker*, 8 Bing. 315.
24. (*Non Pros.*) The plaintiff's attorney, in order to prevent a *non pros* for want of a declaration, which the defendant was in a condition to enter up, obtained a rule to discontinue upon payment of costs, and gave notice of an appointment to tax them; but on the expiration of the rule, instead of paying the costs or entering a discontinuance, served the defendant with a declaration. The defendant upon this entered up judgment of *non pros*, which the Court refused to set aside, but gave the plaintiff the option to proceed upon payment of all costs incurred by the defendant.—*Ariel v. Barrow*, 8 Bing. 375.
25. (*Testing Ca. Sa.*) If judgment of a term previous to the trial be entered by consent, the *ca. sa.*, in proceeding against the bail, may be tested as of that term.—*Hovenden v. Crowther*, D. P. R. 170.
26. (*Cancelling Bail Bond.*) A defendant with two Christian names was arrested under process containing only the initial of one. The Court cancelled the bail bond.—*Ogden v. Barker*, D. P. R. 125.
27. (*Bail in Error.*) The Court refused further time to put in bail in error on the ground that the original bail had been claimed by the defendant in error and withdrawn.—*Anonymous*, D. P. R. 32.
28. (*Warrant of Attorney.*) On a motion to enter up judgment on a warrant of attorney more than a year old, Held, that the attesting witness

- should join in the affidavit, and that it was not enough for him to sign his name to the affidavit as commissioner before whom it was sworn.—*Field v. Bearcraft*, 2 C. & J. 217.
29. (*Return of Languidus*.) If the sheriff returns *languidus*, he should show that he was prevented by the party's illness from producing him at the return of the writ.—*Perkins v. Meacher*, D. P. R. 21.
30. (*Signing Judgment for Irregularity*.) The defendant pleaded without having entered an appearance: Held, that this did not entitle the plaintiff to sign judgment before the time for pleading had expired.—*Nolleken v. Severn*, 2 C. & J. 333.
31. (*Service of Process*.) In the Court of Exchequer (where there is no outlawry<sup>1</sup>), the Court refused to rule that service on the wife of one of the defendants, who was abroad, should be deemed good service, unless the other defendants would undertake not to plead in abatement, saying that the plaintiff should proceed in a court where he might proceed to outlawry.—*Davies v. Morgan*, 2 C. & J. 237.
32. (*Changing the Venue*.) The defendant cannot change the venue after an order for time to plead on the usual terms; but in such order he might have inserted a special saving of the application. (3 Price, 3.)—*Notts v. Curtis*, 2 C. & J. 345.
33. (*Demand of Plea*.) Process served on the 4th November—declaration *de bene esse* delivered on the 10th, indorsed "the defendant to appear and plead hereto in eight days." The defendant having appeared on the 18th, Held, that he was entitled to a demand of plea.—*Willett v. Wilson*, 2 C. & J. 356.
34. (*Error in Process*.) The writ required the defendant to appear on Tuesday, the 15th of April, there being no such day. The notice, however, stated the appearance day to be Friday, the 15th of April: Held sufficient.—*Willan v. Collies*, D. P. R. 35.
35. (*Entitling Declaration*.) George the Fourth having died during a Trinity Term, Held, that a declaration of that term was properly entitled Trinity Term, 1 W. 4.—*Anonymous*, D. P. R. 4.
36. (*Executor's Accounts*.) The Court granted a motion to enlarge a rule calling on an executor to deliver in his accounts, though his affidavits had been only one day on the file.—*Att. Gen. v. Jeyes*, 2 C. & J. 352.
37. (*False Plea*.) To debt on judgment, the defendant pleaded a release dated December, 1831, destroyed by accident. On an affidavit that it was false, the Court allowed the plaintiff to sign judgment as for want of a plea. If it had been a plea on which only one issue could have been taken, it seems the decision would have been different. (4 Bing. 412; 5 B. & A. 750.)—*Smith v. Hardy*, 8 Bing. 435.
38. (*Increasing Issues on Distringas*.) The Court of Exchequer will not increase issues upon a distringas at common law since 7 & 8 Geo. 4, c. 7,

<sup>1</sup> The Uniformity of Process Act (2 W. 4, c. 39,) places all the Courts on a par in this respect.

but if the common law course remains, will leave the plaintiff to act upon it if he thinks fit. (1 C. & J. 548.)—*Watson v. Locke*, 2 C. & J. 203.

39. (*Meaning of Peremptorily.*) *Peremptorily* only means that the party can take out no more rules for time to do the particular act.—*Gray v. Pennell*, D. P. R. 120.

40. (*Notice of Trial.*) In all cases of peremptory undertaking the plaintiff should be bound to give a fresh notice of trial, though the cause is in the paper.—*Salsh v. Cranbrook*, D. P. R. 148.

And see COUNTY PALATINE.—PARLIAMENT.—PARTICULAR OF DEMAND.—PRODUCTION OF INSTRUMENT.—PROMISSORY NOTE.—BAIL.—MISNOMER.

#### PRODUCTION OF DEED.

1. The Court will not compel an attorney to give up his own marriage settlement, though drawn by himself, and though he took no interest under it. (4 B. & Ald. 47.)
2. Where a lease is in the hands of a tenant, and no counterpart can be found, the landlord is entitled to inspect it and take a copy.—*Doc dem.* — *v. Slight*, D. & R. 163.
3. Where the plaintiff had lost his part of an agreement, the Court compelled the defendant's attorney to produce the other part, though not held on any trust for the plaintiff.—*Neale v. Swind*, 2 C. & J. 278.

#### PREBEND (*Advowson belonging to*).

Where the church becomes vacant during the life of a prebendary, but he dies without presenting, the presentation belongs to his personal representative: Held by six judges out of eight who delivered their opinions in the House of Lords. (S. C. 3 Bing. 223; 7 B. & C. 113.)—*Mirchouse v. Rennell*, 8 Bing. 490.

#### PROCESS (*ac etiam*).

An *ac etiam* omitting the words "on promises" is nugatory. It seems that in such a case the Court would not reduce a recognizance given under arrest for a greater sum than £40 to that sum.—*Anonymous*, D. P. R. 155.

2. (*Mistakes in.*) A quo minus was directed to the sheriff of London, and the notice directed the party to appear on the 11th of January, 1831, then past: Held not sufficient ground for setting it aside, and that the copy served need not contain the signature of the clerk of the pleas.—*Clutterbuck v. Wiseman*, 2 C. & J. 213.
3. (*Return.*) Where a party sues out a *fi. fa.* first, a *ca. sa.* cannot issue till after the return of the *fi. fa.* to the Court. The indorsement by the sheriff of what he had done, and sending it to the plaintiff, is not a return.—*Lawes v. Codrington*, D. P. R. 30.

#### PRISONER.

1. (*Discharge.*) A defendant is entitled to his discharge under 48 Geo. 3, c. 123, after being twelve months in prison for the nominal damages in ejectment under £20, although the property recovered be of great value.—*Doc v. —*, D. P. R. 69.



2. (*Discharge.*) A prisoner for a debt under £20 was discharged under 48 Geo. 3, c. 123, though he had refused to deliver his schedule under the Lords' Act.—*Exp. White*, D. P. R. 66.
3. (*Discharge.*) A defendant had given a warrant of attorney for more than £20, though the original debt was less: Held not entitled to his discharge under 48 Geo. 3, c. 123. (6 Moore, 287.)—*White's case*, D. P. R. 19.
4. (*Discharge.*) A prisoner in custody under an attachment for non-payment of costs under £20, is not entitled to his discharge within 48 Geo. 3, c. 123.—*Doe dem. Upton v. Benson*, D. P. R. 15.
5. (*Discharge.*) Under 48 Geo. 3, c. 123, a man who was imprisoned on the 26th November would be entitled to his discharge on the 25th of the November following.—*Anonymous*, D. P. R. 150.

#### PROMISSORY NOTE.

1. (*Consideration.*) The notes in question had been obtained by threats of opposing the maker's (an insolvent's) discharge. One of them being in the hands of an indorsee, and the maker having been arrested on it, the Court cancelled the bail-bond, but refused to compel the other notes to be delivered up, though in the hand of the original payee, an attorney, he holding them as a private creditor.—*Kay v. Masters*, D. P. R. 86.
2. (*What is.*) Assumpsit on the following instrument: "On demand we promise to pay Mr. G. C. or order, £200, for value received in stock of ale, &c. this being intended to stand against me, the undersigned Mary P., as a set off for that sum left me in my father's will above my sister Ann's share." Signed by Mary P. and her husband, the defendant. It appeared that this note was given at the request of G. C., the father of Mary P. and the plaintiff in the cause, to save him the trouble of altering his will; but the relationship was not alleged in the declaration: Held, that this not being a note payable at all events, the plaintiff was not entitled to recover. (2 Camp. 205; 4 Camp. 127; 4 M. & S. 25.)—*Clarke v. Percival*, 2 B. & Adol. 660.

#### ROYAL GRANT.

James I. granted to R. T., his heirs and assigns, a town, manor, and hundred, with appurtenances, and also free warren in all their demeasne lands in the same, and in all other lands and woods being in the same hundred: Held, that the term *demeasne lands* meant the lands of the manor which the lord held in his own lands, and that the words *other lands* meant the lands other than demeasne of R. T.; that the grant, therefore, did not extend over the crown lands within the hundred.—*The Att. Gen. v. Parsons*, 2 C. & J. 279.

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#### SHERIFF.

1. (*Attachment for not bringing in the body.*) The sheriff was served with a rule to return the writ on the 21st November. He made his return as of Michaelmas term. On the 30th November, the plaintiff took out a rule for the sheriff to bring in the body, which was dated as of the last day of Michaelmas term, and served on the 3d December. The Court said that an attachment against the sheriff for not bringing in the body might be taken *cum periculo*.—*Haywood v. Jackson*, 2 C. & J. 208.
2. (*Costs.—Poundage.*) The sheriff is not entitled to his costs under 1 & 2 W. 4, c. 58, s. 6; and the Court required him to pay the proceeds of the seizure in a disputed case into Court, saying, that his right to the poundage would depend on the result.—*Barker v. Dynes*, D. P. R. 169.
3. (*Execution where rent due.—Landlord and tenant.*) After notice that a year's rent is due, which the goods are not sufficient to cover, the sheriff cannot sell, and the Court refused to stay proceedings against a sheriff, who had sold under such circumstances, on his paying over the proceeds.—*Forster v. Hilton*, D. P. R. 35.
4. (*Instructions to.*) The sheriff is not bound to do any thing upon a writ, unless the defendant's place of abode and addition be properly described on it, although he made no objection when it was delivered to him.—*Kenrick v. Nanney*, D. P. R. 58.
5. (*Interest.*) Serviceable process in a cause, to which the sheriff is party, may be directed to him.—*The Mayor, &c. of Kingston-upon-Hull v. Bubb*, D. P. R. 151.
6. (*Where liable for acts of officer.*) In an action against sheriff for extortion, evidence was given that writs generally came into the under-sheriff's office with the name of the officer who was wished to execute it indorsed, and that the officer indorsed was generally adopted, and that if the writ came without such indorsement, it was indorsed there: Held, that the indorsement of a writ was *prima facie* evidence to connect the sheriff with the

ment, as the survivor should appoint. The wife died without joining in any appointment. A., conceiving himself to be tenant in tail, levied a fine with proclamations to the use of himself in fee, and afterwards made a will in execution of his power: Held, that the power was destroyed by the fine.

*Semble*, that every power reserved by a grantor may be released or extinguished, although he reserves no interest in the estate; (*Bird v. Christopher*, Styles, 389); and that every grantee for life, with a power in gross, may in like manner release or extinguish.—*West v. Berney*, *Bickley v. Guest*, R. & M. 431—440.

3. (*Leasing*.) Devisees in trust to pay annuities, and subject thereto to permit A., and after him his wife, to take the profits for life, and, after the decease of the survivor, for their children, has power to make a lease for ten years—*Naylor v. Arnitt*, R. & M. 501.

4. (*Execution*.) A will plainly referring to and comprising the subject of a power, although not stated to be in execution of it, will pass the estates.—*Hunloake v. Gell*, R. & M. 515.

5. (*Creation*.) In a partnership between A. & B. it was stipulated, that in the event of A.'s dying before the expiration of the term, his interest should go to such person as he should by will name and appoint, and, in default of such appointment, to his wife, or, in case of her death, to his children equally. A. by will, not in any way referring to the power, gave "all his estate and effects" to one of his children. He survived his wife, and died leaving three children: Held, that notwithstanding the words "name and appoint," there was no intention to create a power in its technical sense, and to limit the testator's power of disposition, but that his interest in the partnership passed under the words in the will.—*Ponton v. Dunn*, R. & M. 402.

#### PRACTICE.

1. (*Amending*.) An order to amend, obtained in violation of the 13th order, is a mere nullity, and it is unnecessary to move to discharge it.—*De Geneve v. Hannam*, R. & M. 494.

2. (*Notice*.) If a notice of motion is given for too early a day, the defect is not cured by the motion being deferred until after the day on which it might have been regularly made.—*S. C.*

3. (*Motion*.) If a motion, after having been refused with costs in the Court below, be renewed before the Lord Chancellor upon new facts, it is substantially an original motion, and may be granted with costs.—*In the matter of Joseph and Webster*, R. & M. 498.

4. (*Award*.) The Court of Chancery has jurisdiction in awards under the 9 & 10 W. 3, c. 15.—*S. C.*

5. (*Witness*.) *Quere*, whether the Court will, under special circumstances, direct witnesses examined in the cause to be examined to the same points before the Master? (*Smith v. Graham*, 2 Swans. 264.)—*Earle v. Picken*, R. & M. 549.

6. (*Contempt.*) An *ex parte* order of commitment for contempt is not irregular because granted absolutely in the first instance, although the person guilty of the contempt is not a party to the cause.—*Exp. Clarke, R. & M.* 563.
7. (*Officer of court.*) Where an action is brought against an officer of the Court for misconduct in the discharge of his duty, it will interfere to protect him. (*Frowd v. Lawrence*, 1 J. & W. 655.)—S. C.
8. (*Witness.*) Leave given before publication to examine a witness (who had been examined and cross-examined) as to circumstances brought to his recollection after his examination in chief.—*Cockerell v. Cholmeley*, Sim. 313.
9. (*Amendment.*) A *subpoena* was prayed against a defendant when he should come within the jurisdiction. The defendants who appeared, put in their answers, and some months afterwards the plaintiff obtained an order to amend. The order was discharged with costs, the defendant, who was out of the jurisdiction, not being in fact a party to the suit.—*King of Spain v. Hullett*, Sim. 338.
10. (*Orders for time.*) Where a defendant, having taken out three orders for time to answer, then put in a plea, the Court, upon overruling the plea, refused to allow him any further time to answer.—*Mackworth v. Marshall*, Sim. 368.
11. (*Dismissing bill.*) Where upon a motion to dismiss a bill for want of prosecution, the delay was satisfactorily accounted for, the Court refused to make any order.—*Vent v. Pacey*, Sim. 382.
12. (*Dismissing bill.*) The answer was filed on the 30th of November, 1829. On the 17th of February, 1830, the defendant gave notice to dismiss; and two days after the plaintiff obtained an order to amend: Held, that although the plaintiff was at liberty to move to amend after the two months had expired, and before the six weeks had expired, yet it did not prevent the defendant from moving to dismiss the bill.—*Swinfen v. Swinfen*, Sim. 384.
13. (*Amending bill.*) The amendment of a bill under leave on the allowance of a demurrer, is not reckoned for the purposes of the 13th order. (*Spencer v. Bryan*, 9 Ves. 231.)—*Pesheller v. Hammett*, Sim. 389.
14. (*Title.*) Where, upon a question of title, the Master was satisfied with the evidence produced, but upon an exception to his report, the Court differed from him, it was, upon the suggestion of the vendor's counsel that further evidence could be obtained, referred back to the Master to review his report.—*Andrew v. Andrew*, Sim. 390.
15. (*Title.*)—Upon the allowance of exceptions to a report in favour of a title, the Court will, on the application of the vendor, refer it back to the Master to review his report, in order that evidence to remove the objection may be produced.—*Egerton v. Jones*, Sim. 393.
16. (*Production of documents.*) The Court will not order a defendant to produce letters which passed between him and his solicitor in the progress

of the cause, or with reference to it previously to its being instituted, or which contain legal advice. (*Preston v. Carr*, 1 Y. & J. 175; *Newton v. Beresford*, Y. 377.)—*Garland v. Scott*, Sim. 396.

17. (*Exception.*) The Master reported that a bond was voluntary. The report was excepted to on the ground that he ought to have declared it was partly voluntary, and partly for valuable consideration. At the argument the party excepting offered to withdraw the exception, and have the bond considered as voluntary; but the Master of the Rolls considered the party bound by his exception to support the bond as partly for valuable consideration, and refused to allow the withdrawal.—*Nichol v. Vaughan*, D. & C. 424.

And see CREDITOR'S SUIT.—MAINTENANCE.

#### PUBLIC OFFICER.

*Quere*, whether the salary of an assistant parliamentary counsel is assignable? The Court refused to appoint a receiver of the salary before the hearing. (2 Sim. 560.)—*Cooper v. Reilly*, R. & M. 560.

#### RECEIVER.

In a suit for the specific performance of a contract for the sale of an estate in the West Indies, upon which the purchaser had entered, a motion for a receiver was refused, on the ground that the principal defendant (the purchaser,) who resided in the West Indies, had no notice and had never been served with process. (*Tanfield v. Irvine*, 2 Russ. 149.)—*Stratton v. Davidson*, R. & M. 484.

REFORMING INSTRUMENT.—See POWER, 1.

RETAINER.—See LEGACY.

#### SOLICITOR AND CLIENT.

A solicitor, who purchases from his client, is bound to prove that he has paid that price for the property, which, in the exercise of his professional duty, he would have advised his client to accept from a third person; and where this was not shown to have been the case, a bill filed to set aside a purchase, though dismissed on the ground of delay, was dismissed without costs.—*Champion v. Rigby*, R. & M. 539.

And see PRACTICE, 16.

#### SPECIFIC PERFORMANCE.

1. A person having a clear right to £12 for rent, and claiming a title to the land, was induced, by the representation of two professional persons that he had no claim for either the land or rent, to give up both for £10. On a bill for specific performance, he stated the £10 was paid for rent, and denied the agreement: Held, that the agreement, though proved, could not be enforced: and that although a defendant cannot avail himself of a defence appearing only from his evidence, and not stated in his answer, yet that if it appear upon the plaintiff's own case that he is not entitled to the relief prayed, the Court will not assist him.—*Stanley v. Robinson*, R. & M. 527.

2. A., a shareholder in a theatre entered into an agreement with B., C., and D., three other shareholders, by which the theatre was to be leased to them at a certain rent. He subsequently filed a bill against them for specific performance, on which they proved that another agreement, of which they had no notice, had been entered into some years before between A. and other parties, his then co-shareholders in the theatre; and that the earlier agreement contained conditions incompatible with the performance of that into which they had entered; they also proved that two transactions with regard to the letting of boxes had not been truly represented to them. The Vice-Chancellor held, that as the theatre had in substance the benefit represented to accrue from these lettings, the misrepresentation as to mere form was no bar to A.'s claim for a specific performance. This decision was reversed by the Lord Chancellor, whose judgment was affirmed upon appeal.—*Harris v. Kemble*, D. & C. 463.

#### TENANT IN TAIL.

Devise to A. for life, then to B. for life, then to the sons of B. in tail male. During the tenancy of A., a bill was filed by a creditor of the testator for a sale of part of the estates. No inquiry into the incumbrances affecting the estates was directed; and the trustees for the tenants in tail were not made parties to the suit. The lands were sold, and a conveyance executed by the officer of the Court, and by A., and subsequently (though not till after a compromise had been effected) by B., and the residue of the purchase money was ordered to be invested for the benefit of A.: Held, that they were not proper parties; that there ought to have been an account of incumbrances, and that the surplus ought not to have been paid over; that the whole transaction was properly set aside after the death of the two tenants for life, and at the suit of the first surviving tenant in tail; and that the accounts were properly directed to be taken from the death of second tenant for life.—*Mullins v. Townsend*, D. & C. 430.

#### TITHES.

1. (*Prescription*.) Where lands have never paid tithes since the dissolution, if, consistently with the evidence in the cause, it is possible that a discharge could have had a legal origin, the Court will confirm it. (*Monck v. Huskisson*, 1 Sim. 280.)—*Humphreys v. Wagstaff*, R. & M. 529.
2. (*Presumption*.) A portioner, entitled to tithe of hay, is not necessarily entitled to tithe of clover and grass cut green.—*Lewis v. Bridgman*, Sim. 316.
3. (*Terrier*.) A terrier signed by the churchwardens only is admissible evidence to show that, generally speaking, the vicar is entitled to the small tithes.—S. C.
4. (*Issue*.) Where an occupier put in a plea to a bill by a portioner, the latter was held not to be entitled to an issue.—S. C.

#### TRUSTEE.

Under a marriage settlement, the interest of the trust fund was to be paid to the wife during life for her separate use, without power of anticipation,

and after her death, to her husband for life, with remainder to the children of the marriage; and a power was given to the trustees, with the written consent of the wife, to lend the trust money to the husband upon the security of his bond. The trustees advanced the money to the husband without taking any bond from him, and he afterwards became bankrupt: Held, that the trustees must replace the trust fund, and if the husband survived the wife, they would be entitled to his life interest. (*Underwood v. Stevens*, 1 M. 712; *Ryder v. Bickerton*, 3 Sim. 80.)—*Cocker v. Quayle*, R. & M. 535.

### UNDUE INFLUENCE.

M., a barrister, becoming acquainted with a widow possessed of some property of her own, and having large expectations from an aunt, acquires her confidence, engages in the management of her affairs, and persuades her to give him a deed of gift of a third of the aunt's property. When that property comes into possession, he persuades her to transfer one-half of it for himself, and also the other half to be managed by him on her account. He makes misrepresentations to her about her son, and as to other matters, and prevails upon her to execute a release to him. She at length calls for an account, offering him a full discharge if he would pay her the two-thirds of her property, calculated by her at £21,000, but which he refuses to do or to give an account: Held, that the deed of gift and release having been obtained by undue influence and imposition, should be set aside, and M. be ordered to refund what should be found due upon taking the accounts.—*Maccabe v. Mussey*, D. & R. 440.

### WILL.

1. (*Power*.) A testatrix being entitled, under the residuary clause in her brother's will, to £7000 bank stock, with power to appoint the same, by her will appointed all such monies as then constituted the residue of her brother's estate, consisting of £7000 bank stock, to certain persons. Subsequently to the brother's death, and shortly before the date of the will of the testatrix, the £7000 had been increased by an act of parliament (56 Geo. 3, c. 96,) to £8750: Held, that the £8750 passed, the testatrix having evidently intended to dispose of all the residuary property of her brother. (*Milner v. Milner*, 1 Ves. sen. 107.)—*Mathews v. Maulc*, R. & M. 397.
2. (*Survivors*.) A testator gave one-third of his estate to his daughter for life, with remainder to her children equally, and the respective heirs of their bodies, and in case any of the children should die without issue, their shares should go to the survivors or survivor, and others or other of them, and the respective heirs of the bodies of such survivors or survivor, and others or other of them. He gave the other two-thirds in the same way to his daughters B. and C. and their children; and then directed, that if one or more of his daughters should die without such issue, their shares should go to the survivors or survivor for life, with remainder to the children of the bodies of the survivors or survivor of them, (*per stripes* and not *per capita*;) and in case any of such children should die without issue of their bodies, their shares should go to the survivors or survivor, and others or other of them

equally, and the heirs of the bodies of such survivors or survivor, and others or other of them, and in default of such issue to D. and E. B. died leaving children, and C. died without issue: Held, that though "survivors" sometimes might be construed to mean "others," in order to effectuate the intention of a testator, no such intention could be imputed in this case, and that the children of a deceased daughter could not, as to her third share, stand in the place of their parent, so that A. was entitled for life to the share of C., to the exclusion of B.'s children. (*Wilnot v. Wilnot*, 8 Ves. 10; *Davidson v. Dallas*, 14 Ves. 578; *Crowder v. Stone*, 3 Russ. 223.)—*Craufurd v. Winterton*, R. & M. 407.

3. (*Power of Sale*.) A testator devised a farm to his two sons, with permission to dispose of it to A. if they should think proper; and if it should not be sold, he devised the same, after the decease of either of his sons, to the survivor; and after the decease of both, to be sold by auction, and the purchase-money to be equally shared between their children: Held, that the words of the will imported an absolute power of sale, and that the brothers consequently could give an efficient discharge for the purchase-money: that they were joint tenants for life of the purchase-money with benefit of survivorship; with remainders over, according to the provisions of the will, in case the estate was not sold.—(*Sowarsby v. Lacy*, 4 Mad. 142.)—*Breedon v. Breedon*, R. & M. 413.
4. (*Absolute interest*.) A testator bequeathed £2000 to A., subject to a life interest in two other persons; and added words conferring a power of disposition in A. during the continuance of the prior life interests: Held, that as A. under the first words took an absolute interest, which subsequent words were evidently intended to enlarge, he was not thereby precluded from assigning his legacy by deed *inter vivos* executed while the two other persons were still alive. (*Hales v. Margesum*, 3 Ves. 299; *Hixon v. Oliver*, 13 Ves. 108.)—*Comber v. Graham*, R. & M. 450.
5. (*Exoneration*.) A testator devised lands to A. in fee, and reciting that he had executed a bond for the payment of an annuity, he charged the lands so devised, and also A., his heirs, executors, administrators, and assigns, with the payment of it. He also gave several pecuniary legacies and the residue of his personal estate to A. and B.: Held, that the annuity was charged upon the real estate, and upon A. personally, in exoneration of the personal estate. (*Browne v. Groomridge*, 4 Mad. 495.)—*Welby v. Rockcliffe*, R. & M. 571.
6. (*Legacy duty*.) A testator gave an annuity of £300, free from all taxes and stamp duties, to A. and B. for their joint lives, and to the survivor for life, and after the death of the survivor to C. By a codicil he revoked the annuity of £300, and gave to A. and B. a clear annuity of £100 each, with benefit of survivorship: Held, that the latter gift was complete in itself distinct from the former, and therefore liable to the legacy duty.—*Burrows v. Cottrell*, Sim. 375.
7. (*Residue*.) A testator, after directing his real and personal estate to be converted into money and invested, bequeathed the interest, dividends, and produce of the whole of his real estate, and of the residue of his persona



estate, to A. for life, and after her decease, one moiety of the interest of the residue of his personal estate and effects to B., and the other moiety to C. for life, and after her decease the whole of the principal of such moieties, or the whole residue of his estate whatsoever and wheresoever to B.: Held, that the moiety given to C. included the real estate, which formed one mixed fund with the residue of the personalty.—*Byam v. Muntion*, R. & M. 503.

8. (*Estate for life.*) A testator gave "two houses in St. John's-lane, and the other in Toggwell-court, to his wife for life, and after her decease, that in St. John's-lane to A., and the other between B. and C. to be equally divided:" Held, that A. did not take a fee-simple under the will.—*Esdaile v. Gall*, R. & M. 540.
9. (*Vesting.*) A testator devised all his real estate, subject to his daughter's life interest, to all the younger children of his daughter as tenants in common, with a devise over in case his daughter should die leaving no issue; or the children should die under twenty-one, or be married without consent: Held, that the gift extended to the children of the daughter by a second husband. (*Barrington v. Tristram*, 6 Ves. 344): that the children did not take vested interest until twenty-one.—*Critchett v. Taynton*, R. & M. 541.
10. (*Construction.*) A testatrix gave the interest of certain stock equally between A. and B., and in case of the death of either of them, the whole interest to the survivor of them, with a gift over of the principal and interest to C. and D. if they should survive A. and B., and if they should not, to E.: Held, that B., who survived A., took only a life interest.—*Tilson v. Jones*, R. & M. 553.
11. (*Remoteness.*) An estate at C. was settled on A. for life, remainder to his first and other sons in tail male, remainder to A. in fee. A. devised as follows: "As to the reversion and inheritance of the freehold estate at C., purchased by me in pursuance of my marriage articles, bearing date, &c., in case of failure of issue of my body by my said wife, I give and devise the same," &c. He then limited the estate to his brothers in succession, and to their respective first and other sons in tail male: Held, that the devise was good.—*Egerton v. Jones*, Sim. 409.
12. (*Construction.*) A testator having one nephew, one niece, and eight great nephews and nieces living at his death, gave one tenth of his residue to his nephew, another to his niece, and the remainder to trustees in trust for their children at twenty-one; and he empowered his trustees to apply all, or any part, of their respective shares, for their advancement: Held, that all the great nephews and nieces born before the period of division arrived, namely, when the eldest attained twenty-one, were entitled.—*Titcomb v. Butler*, Sim. 417.
13. (*Construction.*) A testator gave the yearly sum of 2,000*l.* sterling to his wife for her life, and after her decease to his trustees, upon the same trusts as after declared concerning the yearly sum of 3,000*l.* sterling. He then gave to his trustees the yearly sum of 3000*l.* sterling to issue out of a suffi-

cient sum of stock in the five per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for life, and, after her decease, for her children. The trustees invested 100,000*l.* five per cents., to answer the two yearly sums. The stock was, two years after the testator's death, converted into four per cents., whereby the dividends became insufficient to pay the yearly sums: Held, that the legatees were not entitled to have the deficiency made good out of the residue.—*Kendall v. Russell*, Sim. 424.

14. (*West India Estate*.) A testator, resident in Jamaica, devised the rents, issues, and profits of certain estates there to A.: Held, that the estates and the slaves, mules, cattle, and machinery thereon, passed.—*Stewart v. Garnett*, Sim. 398.
15. (*Legacy*.) A testator bequeathed to his grandchildren, naming them, the sum of 1,000*l.*, payable to each of them on attaining twenty-one; and, in case of the death of either of them before that period, to be divided amongst the survivors: Held, that the grandchildren were entitled to one sum only of 1,000*l.* and not each of them to a separate legacy to that amount.—*S. C.*
16. (*Fee*.) Devise of "one moiety of the rents, issues, and profits of my estate, named I., in the parish of M., to be divided equally amongst my grandchildren; the other moiety of the rents, issues, and profits of my said estate I give to R. and his heirs:" Held, that the grandchildren take the fee as tenants in common in a moiety of the estate.—*S. C.*

#### WITNESS.

1. (*Refusing to produce Deeds*.)—On a commission to examine witnesses, A. was served with a *subpœna duces tecum* to produce a deed in his possession, and which was to be proved by the subscribing witness; A. and the witness attended, but the former refused to produce the deed, without assigning a sufficient reason for the refusal: Ordered, that A. should attend and produce the deed at his own expense; that the witness should attend at his expense, and that he should pay all costs consequent to his refusal. (*Brassington v. Brassington*, 1 S. & S. 455.)—*Bradshaw v. Bradshaw*, Sim. 285.
2. (*Competency*.) In equity, an objection to the competency of a witness, though apparent upon the record, is not waived by cross-examination. (*Moorhouse v. De Passon*, 19 Ves. 433.)—*Harrison v. Courtland*, R. & M. 428.

## BANKRUPTCY.

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[Deacon and Chitty, Part I.]<sup>1</sup>

[The cases omitted in this Digest will be found in the last Number of the L. M.]

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### ASSIGNEE.

On the appointment of a new assignee no assignment is necessary, the new act vesting the personal estate in the new assignee.—*Exp. Falar*, 32.

### ATTORNEY.

1. (*Admission*.) An attorney unable to attend to be sworn in Court, may be admitted on affidavit made before a Master in Chancery.—*Exp. Sarsin*, 15.
2. (*Sale*.) Where a mortgaged property is sold, and the same solicitor is concerned for the assignor and the mortgagor, a separate solicitor should be appointed for the purposes of the sale.—*Exp. Rolfe*, 77.

### COMMISSION.

Under special circumstances the time for opening a commission was enlarged; and a petition was answered for the same day on which the order was applied for.—*Exp. Moody*, 34. *In matter of Matthews*, 35.

### DIVIDENDS.

The Court ordered unclaimed dividends to be divided amongst the other creditors, on the proper certificate being filed pursuant to the 110th section of the act.—*Exp. Donaldson*, 110.

### DOCKET.

A party applied to strike a docket, and issue a fiat on papers sent from the country on the day after the issuing of the order of the 12th of January, which papers used the word *commission* instead of *fiat*; the application was refused, and the papers sent back to be corrected, and in the mean time another party applied for and struck a docket: Held, that the first party was entitled to the fiat upon his amended papers.—*Exp. Lechmere*, 1.

### EXECUTOR.

One of three executors becoming bankrupt, the others were allowed to prove under the commission.—*Exp. Brown*, 118.

### FIXTURES.

*Semble*, that fixtures capable of removal as between landlord and tenant, without injury to the freehold, are within the order and disposition of the bankrupt and the meaning of the 72d section of the act.—*Exp. Austin*, 207.

<sup>1</sup> This is a new and (judging from the first number) likely to prove a very useful and well executed series of Reports.—EDIT.

# JURISDICTION.

The Lord Chancellor has no jurisdiction to hear an original petition in bankruptcy since the late Act.—*Exp. Lowe*, 30.

# MORTGAGEE.

1. (*Costs.*) The costs of a mortgagor of a sale will be paid out of the proceeds of the sale.—*Exp. Brown*, 34.
2. (*Proof.*) An equitable mortgagee of one partner for a debt due from another, may prove his whole debt against the separate estate of the debtor, and retain his security.—*Exp. Rodgers*, 38.
3. (*Equitable.*) Deeds relating to freehold and leasehold property were deposited with A. but the memorandum accompanying them was confined to the leasehold only: Held, that A. was nevertheless entitled to a sale of the freeholds, but on the terms of paying the costs of the sale.—*Exp. Robinson*, 109.

# PRACTICE.

1. (*Affidavits.*) A party intending to use affidavits already filed in support of a petition to the Lord Chancellor, which has been transferred to the Court of Review, must give notice to the other side.—*Exp. Donaldson*, 36.
2. (*Surrender.*) An order to enlarge the time for a bankrupt's surrender, if there are six clear days between the application and the time appointed for surrendering, is of course.—*Exp. Rose*, 37.
3. (*Attachment.*) Notice of an application to discharge a party on an attachment for not paying costs pursuant to an order, must in all cases be given.—*Exp. White*, 39.
4. (*Service of petition.*) A petition to tax a solicitor's bill must be served on the opposite party.—*Exp. Griffith*, 41.
5. (*Time for answering affidavits.*) Where the petitioner's affidavits were filed only on the day before the petition was appointed to be heard, the Court ordered it to stand over, in order that the respondent might answer them.—*Exp. Billings*, 42.
6. (*Notice.*) Notice must be given of a motion to discharge an order.—*Exp. Lowe*, 43.
7. (*Surrender.*) Where a bankrupt was abroad at the time of issuing the commission, the time for his surrender was enlarged.—*Exp. Dodds*.
8. (*Bargain and sale.*) The Court will not order the bargain and sale from the commissioners to the assignees to be delivered to a purchaser, upon his allegation that the bankrupt had no other freehold property than what was conveyed to the purchaser.—*Exp. Pocock*, 104.
9. (*Resolutions of Creditors.*) The Court refused to adopt and confirm resolutions passed at a meeting of creditors, without referring it to the commissioners to certify whether it would be for the benefit of the bankrupt's estate; it not appearing that the consent of all the creditors had been obtained.—*Exp. Farmer*, 110.

10. (*Opening fiat.*) The Court will not grant further time for opening a fiat to the petitioning creditor, such a method of compelling an arrangement by the bankrupt with his creditors being extremely harsh.—*Exp. Downton*, 111.
11. (*Fraudulent preference.*) A creditor alleging a fraudulent preference has a right to have the case inquired into by the Commissioners, he undertaking to indemnify the assignee against the expenses of the proceeding.—*Exp. Billing*, 112.
12. (*Costs.*) Costs are not given on dismissing a petition, because two petitions for the same object had been dismissed, they having failed on mere matters of form.—*Exp. Hooper*, 117.
13. (*Reference.*) *Semble*, that one of the judges will take a reference in all cases where it has been the practice hitherto to refer any matter to a Master in Chancery.—*Exp. Jeffery*, 206.

#### PROOF.

A joint creditor took an equitable mortgage from one of two partners as a security for the debt; the mortgagor died, and the other partner then became bankrupt: Held, that the creditor might prove under the commission, without the previous sale of his security.—(*Exp. Peacock*, 2 G. & J. 27.)—*Exp. Bowden*, 135.

#### REGISTRATION.

The want of registration of a conveyance invalidates the deed as to subsequent purchasers only, and not as to the assignees of the party conveying.—*Exp. Coles*, 100.

#### SUPERSEDING.

1. A creditor applying to supersede must state, not only that he was a creditor of the bankrupt at the issuing of the commission, but also at the time of the application.—*Exp. Flight*, 78.
  2. A bankrupt who has lain by upwards of two years without taking any steps for ascertaining the amount of the petitioning creditor's debt, cannot petition to supersede on the ground of insufficiency.—*Exp. Hooper*, 117.
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## ECCLESIASTICAL.

## 3 Haggard, Part 3.

## ADMINISTRATION.

1. (*Presumption of death.*) A testator went to Demetara in 1803, leaving a will, dated two years before, and had not been heard of since 1804. His mother, who died in 1826, believed him to have died a bachelor, without having made any later will, and diligent inquiries had been made at Demetara, but without obtaining conclusive evidence of his death. Administration with the will annexed was granted to a residuary legatee, the securities justifying.—*Dean v. Davidson*, 554.
2. (*Widow or next of kin.*) Where the asserted widow married, during the intestate's life-time, another man (who had since been convicted of felony,) with whom she continued to live, the Court granted administration to the next of kin upon her giving justifying security.—*Conyers v. Kitson*, 554.
3. (*Revocation.*) Administration was taken out by a brother of the deceased, there being no formal renunciation by his mother, who, however, was aware of her son's application for administration, and had under it received her distributive share. The brother died, and the mother then formally renounced. The renunciation was rescinded as being unnecessary, and a grant *de bonis* decreed.—*In the goods of Statles*, 560.
4. (*Title of applicant.*) The Court being bound to satisfy itself of the right of an applicant to the grant, will, if any suspicious circumstances occur, such as great delay in the application, call for explanation.—*In the goods of Darling*, 561.
5. (*Widow.*) Where the widow had lived separate from her husband, administration was awarded to the next of kin, the grant being discretionary.—*Lambell v. Lambell*, 570.

## ALIMONY.

In an allegation of faculties the only material circumstance is the amount of income; the particulars, therefore, of a partnership in which the husband is engaged ought not to be set forth, not from forbearance to the husband, but on account of the possible injury to the partner's interest.—*Higgs v. Higgs*, 472.

## APPEAL.

1. (*Costs.*) Appeals for costs only are sometimes allowed, but are much to be discouraged, especially where the sum is trifling.—*Lloyd v. Poole*, 477.
2. (*Peremption.*) If a party does acts in furtherance of a sentence, such as attending the taxation of costs, he bars his right of appeal.—*S. C.*

## CHAPEL.

1. (*Newly erected.*) A clerk cannot officiate in a chapel erected under 7 & 8 Geo. 4, c. 72, without the consent of the incumbent, unless the right of nomination has by deed been previously conveyed to the endower.
2. By the general law, no person can erect a new public chapel, forming part of the ecclesiastical establishment of the Church of England, whether as a chapel of ease or otherwise, ~~without the concurrent~~ consent of the incumbent, patron, and ordinary, and a provision for the compensation of future incumbents.—*Bliss v. Woods*, 486.

## CHURCHWARDEN.

1. (*Exemption.*) Where a person, elected a churchwarden, was excused on payment of a fine, another person elected at the same meeting is bound to serve.—*Birnie v. Weller*, 474.
2. (*Costs*) Churchwardens proceeding fairly and candidly are entitled to protection; if not, they are peculiarly responsible to the Court, and will be made to pay costs.—*Lloyd v. Clarke*, 477.
3. (*District.*) In a suit for subtraction of church rate, the promoters were described as "the churchwardens of A.," one of three districts in a township, for the whole of which they and their predecessors had constantly acted. The defendant appeared under a protest that he occupied lands within the township, but not within the district of A.: Held, that the description would not restrict the office, and was quite sufficient to sustain the suit.—(*Watkins v. Burgess*, 3 Taunt. 127.)—*James v. Kelting*, 483.

## COMMISSION OF REVIEW.

A commission of review will not be granted unless the Lord Chancellor is convinced that the principles of law on which the Court decided were wrong, or the facts misstated or misunderstood.—*Wyatt v. Ingram*, 469.

## DOMICIL.

A British subject domiciled abroad must conform in his testamentary acts to the formalities required by the *lex domicilii*. Where, therefore, the will of a British subject, resident and naturalized in the Portuguese dominions, disposing of property partly there and partly in England, was executed according to the Portuguese law, it was admitted to probate here; but two codicils, fully proved as to capacity and intention, disposing solely of money in the British funds, but not executed according to the Portuguese law, were refused probate.—*Stanley v. Bernes*, 373.

## HUSBAND AND WIFE.

1. (*Adultery.*) Sentence of separation by reason of adultery and cruelty, pronounced on proof of undue familiarities, clandestine communication, with frequent opportunities of guilt, or concealed correspondence by letters denoting great ardour of passion, if not allusions to actual guilt, (but no credible proof of a fact of adultery), united with great violence of conduct and language, and an attempted blow.—*Bramwell v. Bramwell*, 618.
2. (*Restitution.*) On a suit for restitution, the defendant must be compelled to return, unless it be proved that the plaintiff's inherent right is forfeited; but *semble*, less strict proof of cruelty or adultery is necessary, in answer to

such a suit, than where the party making these charges is the original complainant.—S. C.

3. (*Condonation.*) Condonation is a conditional forgiveness, on a full knowledge of all antecedent guilt.—S. C.
  4. (*Marriage.*) The *lex loci contractus* as to marriage will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicile; and, therefore, a second marriage had in Scotland on a Scotch divorce (*à vinculo*) from an English marriage between parties domiciled in England at the time of such marriages and divorce, is null.
- Quere*, whether such divorce would be invalid if the parties were then *bond fide* domiciled in Scotland; still more, if the first marriage took place during a mere casual visit to England, both parties being at all times domiciled in Scotland?—*Conway v. Beasley*, 639.

#### PRACTICE.

1. (*Caveat.*) A party entering a caveat, and alleging himself to be an executor in the last will of the deceased, without inserting the date, has a right to call for an affidavit of scripts, without swearing as to his belief that he is an executor in some paper left by the deceased; and *semble*, without being liable to costs.—*Antrobus v. Ashhurst*, 616.
2. (*Evidence.*) In the absence of proof that registers of episcopal chapels at Edinburgh are by the law of Scotland documents of an authentic and public nature, copies thereof were rejected as inadmissible by the law of England.—*Conway v. Beasley*, 651.

#### WILL.

1. The decision of this case by the Prerogative Court, 1 Law Mag. 671, was reversed.—*Wyatt v. Ingram*, 466.
2. The sentence of the Prerogative Court in this case, 2 Law Mag. 433, was reversed by consent.—*Tyrell v. Marsh*, 471.
3. (*Insanity.*) The will of a person who laboured under an erroneous belief of a continued intention to poison him, but was in all other respects perfectly rational, was declared valid.—*Futleek v. Atkinson*, 527.
4. (*Insanity.*) *Semble*, a will of personalty only made two months before execution, in pursuance of intentions entertained for many years, and of which the execution is delayed merely for want of witnesses, would be valid, even if executed during insanity intervening between the preparation and execution.—S. C.
5. (*Revocation.*) Where a testatrix partially mutilated a duplicate will, (without destroying the seal or signature,) but preserved the other duplicate, such mutilation was considered not even a partial revocation.—*Roberts v. Round*, 548.
6. (*Cancellation.*) A will found in the repositories of the deceased, with the seal cut off, must be presumed to have been cancelled by him *animo cancellandi*, and can only be revived by some other act.—*Lambell v. Lambell*, 568.
7. (*Omissa.*) A will is presumed to have contained, at the time of execution, the final intentions of the deceased. To authorise alterations on the



ground of mistake, there must be some ambiguity in the instrument ; and the proofs of omission or fraudulent suppression must be clear beyond all doubt.—*Shadbolt v. Waugh*, 570.

8. (*Intoxication*.) Where no fixed and settled delusion is shown, and, consequently, no decided actual insanity, and extravagant acts are accounted for by the excitement of liquor, while at times the mind was sound ; in order to avoid a will it must be proved that the deceased was so excited by liquor or so conducted himself during the particular act, as to be at that moment legally disqualified from giving effect to such act.—*Wheeler v. Alderson*, 608.
9. (*Insanity*.) The will (executed eight years before death) of a woman, who, though guilty of excessive drinking and great extravagancies, managed her own property, received her dividends, did various acts of business, corresponded rationally with her friends, and was not shown to be under any delusion, cannot be set aside on the ground of insanity ; and though such will—in total exclusion of distant next of kin (with whom she had quarrelled)—be in the handwriting of, and executed at the office of, her attorney (one of the executors and residuary legatees to a great amount, he and his family also having very large legacies), and the attesting witnesses speak to a bare execution ; documents in her own handwriting, showing both capacity and knowledge of contents, though not mentioning the residue, will supply the additional proofs required by such circumstance.—*S. C.*
10. (*Delusion*.) *Semble*, that insanity has never been held to be established without any delusion having ever prevailed.—*S. C.*
11. (*Insanity*.) Where clear and decisive insanity has been established at a prior time, acts of a doubtful character are of more force in proof of its existence at the time in question ; and even subsequent decidedly insane acts may reflect back on acts otherwise equivocal ; but when no decided acts, prior or subsequent, are proved, equivocal acts, however numerous, will not establish insanity.—*S. C.*

#### ORDER OF COURT.

1832, Hilary Term, 4th Session.

Whereas, the commencement of the Law Terms in his Majesty's Courts at Westminster has been altered by the 1st Wm. 4, c. 70 ; and whereas it will be convenient to the Public that the business of the Courts at Doctors Commons should continue, as heretofore, to commence at or about the same time that it commences in the Courts of Common Law ; I, the undersigned Official Principal of the Court of Arches, having taken the premises into consideration, and having conferred thereon with the Judge of the High Court of Admiralty, the Chancellor of the diocese of London, and others, do hereby order and direct, that in future the first day of each Term in the Court of Arches shall be the day on which such Term commences in the Courts of Common Law ; and that the subsequent Sessions and Court Days in each Term shall be appointed in the same manner as they are at present appointed.

(Signed) JOHN NICHOLL.

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## ABSTRACT OF PUBLIC GENERAL STATUTES.

(2 WILLIAM IV.—*continued.*)

CAP. 31.—An Act to regulate the Baking Trade in Ireland.

[23rd May, 1832.]

CAP. 32.—An Act for the erection of a Nisi Prius Court-house in Dublin.

[23rd May, 1832.]

CAP. 33.—An Act to effectuate the Service of Process issuing from the Courts of Chancery and Exchequer in England and Ireland respectively.

[23rd May, 1832.]

S. 1. The courts of Chancery and Exchequer in England may, on special motion of the complainant in any suit instituted in such courts concerning lands, &c., situate in England or Wales, order that service in any part of Great Britain and Ireland, and the Isle of Man, of any subpœna, letter missive, and of all subsequent process to be had thereon, upon any defendant in such suit, then residing in such part of the United Kingdom or Isle of Man, in which he shall be so served, shall be deemed good service.

S. 2. The same power is given to the courts of Chancery and Exchequer in Ireland.

S. 3. Along with such subpœna or letter missive served under any such order, a copy of the prayer of the bill must be served on every defendant: no process of contempt shall be entered on any such proceedings, nor any decree made absolute, without special order on special motion for that purpose; nothing in this act to make it compulsory on the complainant in any suit to bring before the court any further parties than he is now by the law or practice of the courts required to do.

CAP. 34.—An Act for consolidating and amending the laws against Offences relating to the Coin.

[23rd May, 1832.]

S. 1. Repeals the following statutes from the 30th of April, 1832. stat. de Monetâ, temp. incerti, vulgo 20 E. 1. st. 4, 5, and 6; 27 E. 1 st. 1; 9 E. 3. st. 2; 17 E. 3; 18 E. 3. st. 1; 25 E. 3. st. 5, c. 2, c. 12, c. 13; 27 E. 3. st. 2, c. 14; 3 H. 5. st. 2, c. 6 & 7; 19 H. 7. c. 5; 5 & 6 E. 6. c. 19; 1 Mary, st. 2, c. 6; 1 & 2 Phil. and Mary, c. 11; 5 Eliz. c. 11; 14 Eliz. c. 3; 18 Eliz. c. 1; 6 & 7 W. 3. c. 17. ss. 2, 4, & 12; 8 & 9 W. 3. c. 26; 9 & 10 W. 3. c. 21; 1 Anne, st. 1, c. 9; 7 Anne, c. 24, s. 4; 7 Anne, c. 25, ss. 1 & 2; 15 G. 2. c. 28; 11 G. 3. c. 40; 13 G. 3. c. 71; 37 G. 3. c. 126, s. 1; 56 G. 3. c. 68, ss. 13 to 16; 3 G. 4. c. 114; 7 G. 4. c. 9; also the following Scotch Acts, 6 Parl. Jac. 2; 5 Parl. Jac. 3; 8 Parl. Jac. 3; 7 Parl. Jac. 5; 7 Parl. Jac. 5; 9 Parl. Mary; 9 Parl. Mary; 1 Parl. Jac. 6; 1 Parl. Jac. 6; 1 Parl. W. (S.); also the

following Irish Acts, 3 E. 4. c. 3; 28 Eliz. c. 6; 8 Anne, c. 6; 4 G. 1. c. 9, s. 5; 23 & 24 G. 3. c. 50; 26 G. 3. c. 39: Provided, that offences committed before the repeal may be tried under the old acts after the repeal, but in such cases the person convicted to be liable to transportation for life, or not less than seven years, or imprisonment for not more than four years, instead of capital punishment.

S. 2. This Act to commence May 1st, 1832.

S. 3. Any person convicted of counterfeiting any of the king's current gold or silver coin shall be liable to transportation for life, or not less than 7 years, or to imprisonment for not more than four years; such offence shall be deemed complete, although the coin shall not be in a fit state to be uttered, or the counterfeiting shall not be finished.

S. 4. If any person shall gild or silver, wash, colour, or case over, any coin, intended to resemble or pass for any of the king's current gold or silver coin, or shall gild, or silver, wash, &c., any piece of silver or copper, or of coarse gold or silver or any metal, or mixture of metals, being of a fit size and figure to be coined, and with intent that the same shall be coined into false coin resembling the king's current coin; or shall gild, &c., any of the king's current coin, or file or alter such coin with intent to make it pass for a higher coin; every such offender shall be liable to the punishments mentioned in section 3.

S. 5. If any person shall impair, diminish, or lighten, any current gold or silver coin, with intent to make the same pass for current coin, he shall be liable to transportation for not more than fourteen nor less than seven years, or imprisonment for not more than three years.

S. 6. If any person shall, or shall offer to, buy, sell, receive, or pay, any counterfeit coin as current gold or silver coin, at a lower rate than the same by its denomination imports; or if any person shall import from beyond seas any counterfeit intended to resemble or pass for current gold or silver coin, knowing the same to be counterfeit; every such offender shall be liable to the punishments mentioned in section 3.

S. 7. Every person tendering or uttering counterfeit coin, knowing the same to be counterfeit, shall be imprisoned for any term not exceeding one year, and every person tendering or uttering such counterfeit coin, and having in his possession other counterfeit coin, or tendering counterfeit coin a second time within ten days, shall be imprisoned for not more than two years; and on second conviction the offender shall be liable to the punishments mentioned in section 3.

S. 8. Every person having in his possession three or more pieces of counterfeit gold or silver coin, with intent to utter the same, shall be liable to imprisonment for not more than three years; and on conviction for a second offence, to the punishments mentioned in section 3.

S. 9. On an indictment for a second offence, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy, by the clerk of the court, or other officer having the custody of the records of the court, or by the deputy of such clerk or officer, shall on proof of identity of the offender be sufficient evidence of the previous

conviction, without proof of the signature or official character of the person appearing to have signed and certified the same: for every such copy, a fee of 6s. 8d. shall be taken.

S. 10. If any person shall knowingly and without lawful authority (the proof of which authority shall lie on the party accused) make or mend, or buy or sell, or knowingly, and without lawful excuse, have in his possession, any puncheon, counter-puncheon, matrix, stamp, die, patten or mould, in, or upon which, there shall be impressed, or which will make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the king's current gold or silver coin, or any part thereof; or if any person shall, without lawful authority, make or mend, or buy or sell, or without lawful excuse have in possession any edger, edging tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks apparently resembling those on the king's current gold or silver coin, such person knowing the same to be so adapted or intended; or if any person shall, without lawful excuse, make or mend, &c., any press for coinage, or cutting engine for cutting round blanks out of gold, silver, or other metal, such person knowing such press to be a press for coinage; every such offender shall be liable to the punishments mentioned in section 3.

S. 11. Every person who shall, without lawful authority, convey out of any of his Majesty's Mints any tools for coining, or coin, bullion, or metal, shall be liable to the punishments mentioned in section 3.

S. 12. If any person who shall counterfeit any current copper coin, or shall without lawful authority make or mend, &c., any instrument for counterfeiting such copper coin, or shall buy, sell, &c. any counterfeit coin, intended to pass for current copper coin, at a lower rate than its denomination imports; every such offender shall be liable to transportation for seven years, or to imprisonment for not more than two years; and if any person shall utter any counterfeit coin as current copper coin, or shall have in possession three or more pieces of counterfeit coin, apparently intended to pass for current copper coin, knowing the same to be counterfeit, every such offender shall be liable to be imprisoned for not more than one year.

S. 13. Gold or silver coin suspected to be diminished, otherwise than by reasonable wearing, or to be counterfeit, may be cut by any person to whom it is tendered, who must bear the loss, if it prove to be of due weight, and to be lawful coin; in case of dispute, any justice of the peace may finally determine the matter in a summary manner, and examine the parties on oath.

S. 14. If any person shall discover in any place whatever, or in the possession of any person without lawful excuse, any counterfeit coin, or any tools adapted for counterfeiting coin, the person so discovering may seize and carry the same before a justice of the peace; and on proof of reasonable cause to suspect that any person has been concerned in counterfeiting current coin, or has in his possession any counterfeit coin,

or coining tool, any justice may by warrant cause any place in the occupation or under the controul of such suspected person to be searched, either in the day or night, and if any are found, to cause the same to be seized and carried before a justice of the peace, who shall cause the same to be secured for the purpose of being produced in evidence: such coin and tools shall, after they have been produced in evidence, or where they shall not be required to be so produced, be delivered up to the officers of his Majesty's Mint or to their solicitor.

S. 15. Two or more persons acting in concert in different counties, may be indicted and tried in either county.

S. 16. Indictments for misdemeanors against this act not to be traversed, except for cause shown.

S. 17. Coin may be proved to be counterfeit by the evidence of any credible witness.

S. 18. Principals in the second degree, and accessories before the fact, to any felony against this act, to be punishable as principals in the first degree; and accessories after the fact to be liable to be imprisoned for not more than two years.

S. 19. In cases where imprisonment is awarded, the court may order hard labour and solitary confinement.

S. 20. Offences committed within the jurisdiction of the Admiralty to be tried in the same manner as any other offence committed within that jurisdiction.

S. 21. Contains rules for the interpretation of the expressions "current coin," "counterfeit coin," &c. used in this act.

S. 22. Actions against any person for any thing done in pursuance of this act to be laid and tried in the county where the fact was committed, to be commenced within six calendar months; and notice in writing of the action and cause thereof to be given to the defendant one month before action brought: the general issue may be pleaded, and defendant may tender amends, or pay money into court; and though a verdict be given for plaintiff, he is not to be entitled to costs unless the judge shall certify.

CAP. 35.—An Act to continue until the Fifth Day of March, One thousand eight hundred and thirty-three, and from thence to the end of the then next Session of Parliament, an Act of the Fifty-fourth Year of King George the Third, for rendering the Payment of Creditors more equal and expeditious in Scotland. [23d May, 1832.]

CAP. 36.—An Act to allow the Importation of Lumber and of Fish and Provisions, duty free, into the Islands of Barbadoes, Saint Vincent and Saint Lucia; and to indemnify the Governors and others of those Islands for having permitted the Importation of those Articles duty free.

[23d May, 1832.]

CAP. 37.—An Act to amend an Act of the Tenth Year of his late Majesty King George the Fourth, by extending the Time within which pre-existing Societies must conform to the Provisions of that Act. [23d May, 1832.]

S. 1. The term of three years allowed by the 10th G. 4, c. 56, to

Friendly Societies enrolled before the passing of that act, for conforming to the provisions thereof, extended to Michaelmas Day, 1834, and in the meanwhile to be subject to the provisions of the several acts repealed by that act.

S. 2. Recited act of 10th G. 4, c. 56, to extend to societies established under 36th G. 3, (I.) if such societies shall conform to the provisions thereof within the time limited by this act.

S. 3. This act to be a public act, and to extend to Great Britain and Ireland and Berwick-upon-Tweed.

CAP. 38.—An Act to continue for One Year, and from thence until the End of the then next Session of Parliament, the Acts for the Relief of Insolvent Debtors in Ireland. [23d May, 1832.]

CAP. 39.—An Act for Uniformity of Process in Personal Actions in His Majesty's Courts of Law at Westminster. [23d May, 1832.]

S. 1. The process in all personal actions commenced in the superior courts of common law at Westminster, in cases where it is not intended to hold the defendant to special bail, or to proceed against a member of parliament according to the Bankrupt Act, 6 G. 4, c. 16, shall, whether the action be brought by or against any person entitled to the privilege of peerage or of parliament, or of the court, or to any other privilege, or by or against any other person, be according to the form in schedule No. 1 to this act annexed, and which process shall be called a writ of summons; in such writ the residence of the defendant shall be mentioned; and such writ shall be issued by the officer of the said courts respectively, by whom process serviceable in the county hath been heretofore issued; every such writ may be served in the usual manner in the county therein mentioned, or within two hundred yards of its border; and the person serving the writ is to indorse the day of the month and week of the service.

S. 2. The mode of appearance shall be by delivering a memorandum in writing according to the form No. 2 in the schedule, to such officer as the court shall direct, to be dated on the day of delivery.

S. 3. If it shall be made appear by affidavit to the satisfaction of the court, or of a judge in vacation, that a defendant has not been personally served with such writ of summons, and has not appeared to the action, and cannot be compelled so to do without some more efficacious process, then the court or judge may order a writ of distringas to be issued, directed to the sheriff of the county wherein the place of abode of the defendant is situate, or to the sheriff of any other county, in order to compel appearance; which writ of distringas shall be in the form and with the notice subscribed No. 3; which writ of distringas and notice, or a copy, shall be served on the defendant, or if he cannot be met with, be left at the place where it is to be executed; and a copy of the writ and notice shall be delivered therewith to the officer to whom the writ is directed; such writ to be made returnable in term, not less than fifteen days after the teste, and to bear teste on the day of issuing, whe-

ther in term or vacation; and if a return be of *non est inventus* or *nulla bona*, and the plaintiff shall not intend to proceed to outlawry or waiver, and the defendant shall not appear within eight days inclusive after the return, and it be made appear to the court or judge that proper means were used to serve and execute such writ of distringas, the court or judge may authorize the plaintiff to enter an appearance for the defendant and to proceed to judgment and execution.

S. 4. In actions where it shall be intended to hold the defendant to bail, if he be not in the custody of the Marshal of the Marshalsea or of the Warden of the Fleet, the process shall be by writ of *capias*, according to form No. 4 in the schedule; and so many copies as there are defendants to be arrested shall be delivered to the officer to whom the process is directed, and who shall, on the execution of the process, serve a copy on each defendant, and indorse the day of the execution thereof, whether by service or arrest; and if any defendant be taken on such process and imprisoned for want of sureties, the plaintiff may, before the end of the next term after the detainer or arrest, declare against such defendant, and proceed according to the 4th and 5th W. & M. c. 21: provided that the plaintiff or his attorney may order the officer to arrest one or more of the defendants, and to serve a copy on one or more of the others; such service to be of the same force as service of the writ of summons before mentioned.

S. 5. On a return of *non est inventus* to a writ of *capias*, or of *non est inventus* and *nulla bona* to a writ of distringas, the plaintiff may proceed to outlaw or waive such defendant by writs of *exigi facias* and proclamation, in the usual manner: provided that such writ of exigent and proclamation, and other writ subsequent to the writ of *capias* or distringas, shall be made returnable on a day certain in term; and every such first writ of exigent and proclamation shall bear teste on the day of the return of the writ of *capias* and distringas, whether it be returned in term or vacation; and every subsequent writ shall bear teste on the day of return of the next preceding writ; and no such writ of *capias* or distringas shall be sufficient for the purpose of outlawry or waiver, if returned within less than fifteen days after delivery to the officer.

S. 6. After judgment in any action commenced by writ of summons or *capias*, proceedings to outlawry or waiver may be taken, as may now be done after judgment in an action commenced by original writ: provided that every such outlawry or waiver may be set aside by writ of error or motion in the usual way.

S. 7. The Lord Chief Baron of the Exchequer to appoint a person as a filazer exigenter and clerk of the outlawries in that court.

S. 8. The process of detainer of a prisoner in the Marshalsea or Fleet to be according to the form of the writ of detainer in the schedule No. 5; a copy of the process to be delivered with such writ to the Marshal or Warden, who must serve the same on the defendant; such process may issue from either of the superior courts, and the declaration may allege



the prisoner to be in the custody of the Marshal or Warden, and the proceedings be as against prisoners in the custody of the sheriff, unless otherwise ordered by rule of court.

S. 9. In proceeding against a member of parliament under the 6th G. 4, c. 16, s. 10, the process shall be according to the form in the schedule No. 6.

S. 10. No writs issued under this act shall be in force for more than four calendar months from the day of the date, but writs of summons and capias may be continued by alias and pluries: provided that no first writ shall prevent the operation of any statute of limitations of actions, unless the defendant shall be arrested, or served therewith, or proceedings to outlawry had, or such writ, and every continuing writ, be returned *non est inventus* and entered of record within one calendar month after its expiration; and unless every continuing writ shall be issued within one month of the preceding writ, and contain a memorandum of the date of the first writ; and return in bailable process to be made by the officer to whom writ directed, and in process not bailable, by the plaintiff or his attorney.

S. 11. If any writ of summons, capias, or detainer be served on any day in term or vacation, all necessary proceedings to judgment and execution may be had thereon without delay, at the expiration of eight days, whether such day be in term or vacation: provided always, that if the last of such eight days be on a Sunday or Fast Day, the following day shall be considered as the eighth day; and if it shall fall on any day between the Thursday before and Wednesday after Easter Day, then the Wednesday after Easter Day shall be considered as the eighth day: provided also, that if the writ be served between the 10th of August and 24th of October, special bail may be put in, or appearance entered, at the expiration of such eight days: provided also, that no declaration or pleading after declaration shall be filed or delivered between the 10th of August and the 24th of October.

S. 12. Every writ issued under this act shall bear date on the day of issuing, and be tested in the name of the Lord Chief Justice or Lord Chief Baron, and shall be indorsed with the name and place of abode of the attorney suing out the same; or if no attorney be employed, then with a memorandum expressing that it has been sued out by the plaintiff in person, with the name of the city, town, or parish, hamlet, street and number of plaintiff's residence.

S. 13. Writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary; and if issued against the inhabitants of a hundred on the high constable; and if against the inhabitants of a county, city, or town, franchise, or place not being part of a hundred, on some peace officer thereof.

S. 14. The judges may make general rules for the effectual execution of this act.

**S. 23. May be altered this session.**

**S**

*Memorandum to be subscribed on the Writ.*

N. B. This writ is to be served within four calendar [months from the date thereof, including the day of such date, and not afterwards.

Indorsement to be made on the writ before service thereof,

This Writ was issued by E. F. of

Attorney for the said A. B.

Or,

This Writ was issued in Person by A. B. who resides at [mention the City, Town, or Parish, and also the name of the Hamlet, Street, and number of the House of the Plaintiff's Residence, if any such.]

Indorsement to be made on the writ after service thereof.

This writ was served by me X. Y. on                      on                      the  
day of                      18

X. Y.

No. 2.

*Forms of entering an Appearance.*

A. B. Plaintiff against C. D.	}	The Defendant C. D. appears in person.
or,		E. F. Attorney for C. D. appears for him.
Against C. D. and another,		G. H. Attorney for the plaintiff appears for the
or,		Defendant C. D. according to the Statute.
Against C. D. and others,		
Entered the	day of	18

No. 3.

*Writ of Distringas.*

William the Fourth, &c.

To the Sheriff of

Greeting :

We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same and distrain upon the goods and chattels of C. D. for the sum of forty shillings, in order to compel his appearance in our Court of to answer A. B. in a plea of trespass on the case [or debt, or, as the case may be,] and how you shall execute this our writ you make known to us in our said court on the                      day of                      now next ensuing.

Witness                      at Westminster, the                      day of                      in the  
year of our Reign.

*Notice to be subscribed to the foregoing Writ.*

In the Court of

Mr. C. D.

Between { A. B. Plaintiff,  
                    and  
                    C. D. Defendant.

Take notice, that I have this day distrained upon your goods and chattels in the sum of forty shillings, in consequence of your not having appeared in the said court to answer to the said A. B. according to the exigency of a writ of summons bearing teste on the                      day of                      ; and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [if the defendant be subject to outlawry] will cause proceedings to be taken to outlaw you.

No. 4.

*Writ of Capias.*

William the Fourth, &c.

To the Sheriff of

*or,*

To the Constable of Dover Castle,

*or,*

To the Mayor and Bailiffs of Berwick-upon-Tweed,

*or,*

[*as the case may be,*]

Greeting :

We command you, [*or as before, or often we have commanded you,*] that you omit not by reason of any liberty in your bailiwick, but that you enter the same and take C. D. of                      if he shall be found in your bailiwick, and him safely keep until he shall have given you bail or made deposit with you according to law in an action on promises [*or of debt, &c.*] at the suit of A. B. or until the said C. D. shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof you do deliver a copy hereof to the said C. D. And we hereby require the said C. D. to take notice, that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our court of                      to the said action, and that in default of his so doing such proceedings may be had and taken as are mentioned in the warning hereunder written or indorsed hereon. And we do further command you the said sheriff, that immediately after the execution hereof, or that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner if you shall be thereto required by order of the said Court or by any judge thereof.

Witness                      at Westminster, the                      day of

*Memorandum to be subscribed to the Writ.*

N.B. This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

*A Warning to the Defendant.*

1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant before the end of the term next after such detainer or arrest and proceed thereon to judgment and execution.

2. If a defendant, being arrested on this writ, shall have made a deposit of money according to the statute 7 & 8 Geo. IV. c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

3. If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail bond.

4. If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant and proceed thereon to judgment and execution.

*Indorsements to be made on the Writ of Capias.*

Bail for £                    by affidavit.

or,

Bail for £                    by order of [naming the judge making the order,] dated the  
day of

This writ was issued by E. F. of  
[or plaintiffs] within named

Attorney for the plaintiff

or,

This writ was issued in person by the plaintiff within named, who resides at  
[mention the City, Town, or Parish, and also the name of the  
Hamlet, Street, and number of the House of the Plaintiff's Residence, if any such  
there be.]

No. 5.

*Writ of Detainer.*

William the Fourth, &c.

To the Marshal of the Marshalsea of our Court before us [or To the Warden of  
our Prison of the Fleet.]

We command you that you detain C. D. if he shall be found in your custody at  
the delivery hereof to you, and him safely keep, in an action on promises [or of  
debt, &c. as the case may be,] at the suit of A. B. until he shall be lawfully dis-  
charged from your custody. And we do further command you, that on a receipt  
hereof you do warn the said C. D., by serving a copy hereof on him, that within  
eight days after service of such copy, inclusive of the day of such service, he do  
cause special bail to be put in for him in our Court of                    to the said  
action; and that in default of his so doing the said A. B. may declare against him  
before the end of the term next after his detainer, and proceed thereon to judgment  
and execution. And we do further command you the said [Marshal or Warden,  
as the case may be,] that immediately after the service hereof you do return this our  
writ, or a copy hereof, to our said court, together with the day of the service hereof.

Witness                    at Westminster, the                    day of

N. B. This Writ is to be indorsed in the same manner as the Writ of Capias, but  
not to contain the warning on that writ.

No. 6.

*Writ of Summons to be served on a Member of Parliament in order to enforce the  
Provisions of the Statute 6 Geo. IV. c. 16. s. 10.*

William the Fourth, &c.

To C. D. of &c. Esquire, having privilege of parliament, greeting :

We command you, that, within one calender month next after personal service  
hereof on you, you do cause an appearance to be entered for you in our Court of  
in an action [on promises, debt, &c. as the case may be,] at the  
suit of A. B.; and you are hereby informed, that an affidavit of debt for the sum of  
hath been filed in the proper office, according to the provisions of a  
certain act of parliament made and passed in the sixth year of the reign of his  
late Majesty King George the Fourth, intituled "An Act to amend the Laws  
relating to Bankrupts," and that unless you pay, secure, or compound for the debt  
sought to be recovered in this action, or enter into such bond as by the said act is

provided, and cause an appearance to be entered for you within one calendar month next after such service hereof, you will be deemed to have committed an act of bankruptcy from the time of the service hereof.

Witness                      at Westminster, the                      day of

N. B. This Writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.

*Direction.—This Summons is to be indorsed with the name of the plaintiff or his attorney in like manner as the writ of Capias.*

CAP. 40.—An Act to amend the Laws relating to the Business of the Civil Department of the Navy, and to make other regulations for more effectually carrying on the duties of the said Departments. [1st June, 1832.]

CAP. 41.—An Act to facilitate the recovery of Tithes in certain cases in Ireland, and for relief of the Clergy of the Established Church.

[1st June, 1832.]

CAP. 42.—An Act to authorize (in Parishes enclosed under any Act of Parliament) the letting of the poor allotments in small portions to Industrious Cottagers.

[1st June, 1832.]

S. 1. Trustees of allotments made for the benefit of the poor, together with the churchwardens and overseers in vestry assembled, may, and are required to, let portions of such allotment, not less than one fourth of an acre, and not exceeding one acre, to any one individual, as a yearly occupation from Michaelmas to Michaelmas, to such industrious cottagers, being day labourers or journeymen legally settled in the parish, and dwelling within or near its bounds, as shall apply for the same.

S. 2. The person hiring the land to cultivate it so as to preserve it in a due state of fertility.

S. 3. For the purpose of carrying this act into effect a vestry shall be held in the first week of September in every year, of which ten days' notice shall be given, at which vestry the trustees may attend and vote, and at which any industrious cottager may apply to rent a portion of the land; the vestry are required to reject the application, or to make an order that he shall be permitted to occupy such portion as they shall determine; the said order to be a sufficient authority to the applicant to enter into occupation of the land.

S. 4. The rent shall be payable in one sum at the end of the year's occupation.

S. 5. If the rent shall be four weeks in arrear, or the land not duly cultivated, the parish officers, with consent of the vestry, may give notice to quit within one week after notice served on the occupier.

S. 6. If any person to whom land has been let as aforesaid shall refuse to deliver up possession, or if any other person shall unlawfully hold possession of such land, the churchwardens and overseers may exhibit a complaint before two justices, who are authorized to issue a summons under their hands and seals to the person against whom complaint shall be made to appear before them; and the justices on appearance, or proof that the summons has been served, may hear and determine the complaint, and if they shall adjudge the same to be true, then by

warrant under their hands and seals cause possession of the land to be delivered to the churchwardens and overseers.

S. 7. Arrears of rent shall be recoverable by application to two justices in petty sessions, who shall summon the party, and if they find any rent to be due, issue a warrant to levy the same upon the goods of the person from whom the rent shall be due.

S. 8. The rent to be applied in the purchase of fuel to be distributed in winter among the poor parishioners.

S. 9. If any allotments shall lie at an inconvenient distance, the vestry may let such allotment, and hire in lieu thereof land of equal value for the purposes of this act.

S. 10. No habitations shall be erected on the land demised under this act.

S. 11. The powers of this act to be held to apply where applicable to the acts of 1 & 2 W. 4. c. 42, and 59.

CAP. 43.—An Act to continue until the First day of March One thousand eight hundred and thirty-six an Act of the Ninth Year of His late Majesty, for the Relief of Insolvent Debtors in India. [1st June, 1832.]

CAP. 44.—An Act to continue for Three Years and to amend the Laws for the Relief of Insolvent Debtors in England. [6th June, 1832.]

S. 1. The acts of 7 G. 4. c. 57, and 1 W. 4. c. 38, are continued.

S. 2. Assignees shall not be required to execute a counterpart of conveyances, but the provisional assignee shall execute such conveyances in duplicate, one part to be filed of record in the Insolvent Court; a copy of such record to be evidence of the conveyances and of title.

S. 3. Examiners may be appointed in Middlesex and Surrey, the city of London, and borough of Southwark, as well as in the country.

S. 4. This act may be altered this session.

S. 5. The recited acts and this act to continue in force until the first of June, 1835.

CAP. 45.—An Act to amend the Representation of the People in England and Wales. [7th June, 1832.]

S. 1. Each of the boroughs enumerated in the schedule marked (A.) to this act annexed shall, after the end of this present parliament, cease to return any member or members to serve in parliament.

S. 2. Each of the boroughs enumerated in schedule (B.) shall return one member only.

S. 3. Each of the places named in schedule (C.) shall, for the purposes of this act, be a borough, and shall return two members.

S. 4. Each of the places named in schedule (D.) shall, for the purposes of this act, be a borough, and shall return one member.

S. 5. The borough of New Shoreham shall include the rape of Bramber in Sussex, except such parts thereof as shall be included in the borough of Horsham; the borough of Cricklade shall include the hundreds and divisions of Highworth, Cricklade, Staple, Kingsbridge, and Malmsbury in Wiltshire, except such parts as shall be included in the borough of Malmsbury; the borough of Aylesbury shall include the three hundreds of Aylesbury,

in the county of Buckingham; and the borough of East Retford shall include the hundred of Bassetlaw in the county of Nottingham.

S. 6. The borough of Weymouth and Melcombe Regis shall return two members only; the borough of Penryn shall include the town of Falmouth; and the borough of Sandwich shall include the parishes of Deal and Walmer.

S. 7. Every city and borough in England which now returns a member or members, and every place sharing in the election therewith, (except the several boroughs enumerated in schedule A.), and except the boroughs of New Shoreham, Cricklade, Aylesbury, and East Retford, shall, and each of the boroughs of Penryn and Sandwich also shall, include the place or places to be comprehended within the boundaries of every such city, borough or place, as such boundaries shall be settled by an act to be passed for that purpose in this parliament.

S. 8. Each of the places named in schedule (E.) shall have a share in the election of a member to serve for the shire town, or borough, mentioned in conjunction therewith.

S. 9. The boundaries of places and shire-towns named in schedule (E.), and of the borough of Brecon, to be settled by an act to be passed for that purpose.

S. 10. The boundaries of the towns of Swansea, Loughor, Neath, Aberavon, and Kenfig, to be settled by an act to be passed for that purpose, and collectively to return one member; the portreeve of Swansea to be the returning officer; and no person by reason of any right accruing in any of the said five towns shall have a vote for the borough of Cardiff.

S. 11. The persons respectively described in schedules (C.) and (D.) shall be returning officers for the respective boroughs therein mentioned; and where no persons are mentioned in such schedules as returning officers, the sheriff of the county shall, within two months after the passing of this act, and in March in every year, by writing under his hand, to be delivered to the clerk of the peace, and by him filed with the records of his office, appoint for each borough a fit person, resident therein, to be returning officer; and in the event of the death of such person, or of his becoming incapable to act, the sheriff shall forthwith nominate a successor; and no person shall be compellable to serve a second time in the said office for the same borough: Provided that no person in holy orders, nor churchwarden or overseer within such borough, shall be nominated as returning officer; and that no returning officer shall be appointed churchwarden or overseer: Provided also that no person qualified to serve in parliament shall be compellable to serve as returning officer for any borough, if within one week of notice of his appointment he shall make oath of such qualification before a justice of the peace, and notify the same to the sheriff, provided that in case the king shall grant a charter or incorporation to any of the boroughs named in schedules (C.) and (D.) and shall by such charter give power to elect a mayor or other chief municipal



officer, then such mayor or officer shall be returning officer for such borough.

S. 12. In all future parliaments there shall be six knights of the shire for Yorkshire, two for each riding: the courts for the election to be at York, Wakefield, and Beverley respectively.

S. 13. There shall be four knights of the shire for the county of Lincoln, two for the parts of Lindsey, and two for the parts of Kesteven and Holland; the courts for the election to be at Lincoln and Sleaford.

S. 14. Each of the counties enumerated in schedule (F.) shall be divided into two divisions, to be settled by another act, and there shall be four knights for each of the said counties, two for each division, the courts for the election to be named in the act referred to.

S. 15. There shall be three knights for each of the counties enumerated in schedule (F. 2.) and two for each of the counties of Carmarthen, Denbigh, and Glamorgan.

S. 16. The Isle of Wight shall, for the purposes of this act, be a county of itself, and return one knight; the election to be holden at the town of Newport, and the sheriff of the Isle of Wight, or his deputy, to be returning officer.

S. 17. For the purpose of electing knights of the shire, the East Riding of the county of York, the North Riding of the county of York, the parts of Lindsey in Lincolnshire, and the several counties at large, enumerated in schedule (G.), shall respectively include the several cities and towns respectively mentioned in conjunction with such ridings, parts and counties at large, in the said schedule.

S. 18. No person shall be entitled to vote for the election of knights of the shire, or of members for any city or town being a county of itself, in respect of any freehold tenement for life, except such person shall be the bonâ fide occupier thereof, or except the same shall have come to such person by marriage, marriage settlement, devise, or promotion to any benefice or office, or except the same shall be of the clear yearly value of 10*l.* above all rents and charges: Provided that this act shall not prevent freeholders now seised for life from retaining or acquiring such right of voting, if such right be duly registered.

S. 19. Copyholders for life, or for any larger estate, of the clear yearly value of 10*l.*, shall be entitled to vote in the election of knights of the shire.

S. 20. Lessees or assignees of tenements of whatever tenure, for the unexpired residue of any term originally created for not less than sixty years (whether determinable on a life or lives, or not,) of the clear yearly value of 10*l.* above all rents and charges, or for the unexpired residue of any term originally created for not less than twenty years, of the clear yearly value of not less than 50*l.*, or persons who shall occupy, as tenant, any lands or tenements for which he shall be liable to a yearly rent of not less than 50*l.*, shall be entitled to vote in the election of knights of the shire in which such tenements shall be situate: Provided that no sub-lessee, or assignee of any underlease, shall have a right to

vote in respect of any such term of 60 or 20 years, unless he be in the actual occupation of the premises.

S. 21. No public tax, nor church, county, or parochial rate shall be deemed to be a charge payable out of lands within the meaning of this act.

S. 22. Voters for knights need not be assessed to the land tax.

S. 23. Trustees and mortgagees not in actual possession or receipt of the rents and profits shall not be entitled to vote, but the mortgagor or cestui que trust.

S. 24. No person shall be entitled to vote for a knight of the shire in respect of any freehold house, &c. occupied by himself, which would confer a vote for any city or borough.

S. 25. No person shall be entitled to vote for a knight of the shire in respect of any copyhold or leasehold house, &c., which would confer a vote for any city or borough.

S. 26. No person shall be entitled to vote for a knight of the shire unless duly registered; and no person shall be registered in any year in respect of his estate or interest in lands, &c., as a freeholder, copyholder, customary tenant, or tenant in ancient demesne, unless he shall have been in the actual possession thereof, or in receipt of the rent and profits for his own use, for six calendar months next previous to the last day of July in such year; and no lessee or assignee, occupier or tenant shall be registered, unless he shall have been in actual possession, or in receipt of the rent and profits for twelve calendar months next previous to the last day of July: the above provisions not to apply to persons obtaining property by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in a church or to any office.

S. 27. In every city or borough returning members, every person who shall occupy within such city or borough, or within any place sharing in the election, as owner or tenant, any house, warehouse, &c. of the clear yearly value of 10*l.*, shall be entitled to vote: provided that no such person shall be registered, unless he shall have occupied the premises for twelve calendar months next previous to the last day of July, nor unless he shall have been rated in respect of such premises to the poor-rate, nor unless he shall have paid, on or before the 20th of July, all the poor's rates and assessed taxes payable in respect of such premises previously to the 6th day of April preceding: provided also, that he shall have resided for six calendar months next previous to the last day of July within the city or borough, or place sharing in the election, or within seven statute miles thereof.

S. 28. The premises, in respect of the occupation of which any person shall be entitled to vote, need not be the same premises, but may be different premises occupied in immediate succession.

S. 29. In case of the occupation of premises by more persons than one, as owners or tenants, in any city or borough, each occupier shall be entitled to vote, if the clear yearly value, when divided, shall give a sum of not less than 10*l.* for each occupier.

S. 30. Occupiers of houses, &c. in cities or boroughs or places sharing in the election may claim to be rated; and on their making such claim, and actually paying or tendering the full amount of the rate then due, the overseers are required to put the occupier's names on the rate for the time being; in case the overseers shall neglect or refuse so to do, such occupier shall for the purposes of this act be deemed to have been rated: provided, that where by virtue of any act of parliament the landlord shall be liable to pay the rate, nothing herein contained shall be deemed to discharge such liability.

S. 31. In every city or town, being a county of itself, in which freeholders or burgrave tenants now have a right to vote, every such freeholder and burgrave tenant shall be entitled to vote, if duly registered; but no such person shall be registered in respect of any freehold or burgrave tenement, unless he shall have been in actual possession thereof, or in the receipt of the rents and profits for his own use, for twelve calendar months previous to the last day of July, (except where the same shall have come to him at any time within such twelve months by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice or office,) nor unless he shall have resided for six calendar months next previous to the last day of July within such city or town, or within seven miles thereof: provided that this enactment shall not vary the provisions before made relative to the right of voting in any city or town being a county of itself, in respect of any freehold for life: provided also, that the above provisions shall extend to freeholds and burgrave tenements within the new boundaries.

S. 32. Every person formerly entitled to vote as a burgess or freeman of a city or borough shall still be entitled to vote, if duly registered; but no such person shall be registered in any year, unless he shall, on the last day of July in such year, be qualified so as to vote, if such day were the day of election, and this act had not been passed, nor unless he shall have resided for six months next previous to the last day of July within such city or borough, or within seven miles of the place where the poll shall heretofore have been taken, nor unless, where he shall be a burgess or freeman of any place sharing in the election for any city or borough, he shall have resided for six months next previous to the last day of July within such place, or within seven miles of the place mentioned in conjunction with such place, and named in schedule (E. 2): provided that no person admitted a burgess or freeman since the 1st of March, 1831, otherwise than in respect of birth or servitude, shall be entitled to vote or be registered: provided also, that every person formerly entitled to vote as a burgess or freeman of Swansea, Loughor, Neath, Aberavon, or Kenfig, in the election for the borough of Cardiff, shall cease to vote in such election, and instead thereof be entitled to vote for the borough composed of Swansea, Loughor, Neath, Aberavon, and Kenfig.

S. 33. No person shall vote for any city or borough except in respect of some right conferred by this act, or as a burgess or freeman, or free-

holder or burgage tenant: provided that every person now having a right to vote in virtue of any other qualification than as a burgess or freeman, or freeholder or burgage tenant, shall retain such right so long as he shall be qualified according to the usages of such city or borough, and if duly registered, six months' residence within seven miles required, as in the next preceding section: such right of voting to cease, if omitted from the register for two successive years.

S. 34. Contains particular provisions as to persons now entitled to vote for New Shoreham, Cricklade, Aylesbury, or East Retford in respect of freeholds.

S. 35. No person shall vote for any city or borough (other than a city or town being a county of itself) in respect of any burgage tenement or freehold acquired since March 1, 1831, unless acquired by descent, succession, marriage, devise, or promotion to a benefice or office.

S. 36. Persons receiving parochial relief within twelve months not to be registered.

S. 37. Overseers on the 20th of June in every year to fix notices on the doors of churches and chapels according to the Form No. 1. in Schedule (H.), requiring all persons entitled to vote for knights of the shire to deliver to the overseers, on or before the 20th of July, a notice of their claim according to the Form numbered 2 in Schedule (H.), provided that persons once on the register need not make any subsequent claim.

S. 38. Overseers to prepare lists of county voters every year, according to Form 3 in Schedule (H.); to have power of objecting to any name inserted in the lists; to sign such lists, and keep copies for inspection. In places where there are no overseers, the list to be made out by the overseers of the parish next adjoining.

S. 39. Persons in the register for the time being may object to persons not entitled to be retained in the county lists, such objection to be by written notice, according to Form 4 in Schedule (H.); a notice also according to Form 5 in Schedule (H. to be served on the party objected to; a list of the persons objected to, according to Form 6 in Schedule (H.), to be published by the overseers.

S. 40. The overseers to deliver the lists to the high constable of the hundred, by him to be delivered to the clerk of the peace, who is to make an abstract of the number of persons objected to, and transmit the same to the barrister appointed to revise the lists.

S. 41. Judges of assize to nominate barristers to revise the lists of county voters; such barrister to give notice of the times and places at which he will hold Courts for that purpose, such times being between the 15th of September and the 25th of October: provided that no Member of Parliament or person holding office under the crown shall be appointed such barrister, and that no barrister shall be eligible to serve in Parliament for eighteen months from the time of his appointment for the county for which he shall be appointed.

S. 42. The clerk of the peace and overseers shall attend before the barrister, and answer all questions on oath touching any matters necessary

for revising the lists: the barrister to retain in the lists all names not objected to and those objected to, unless the party objecting shall appear in support of his objection; in case the objecting party appears, the person objected to shall require proof of qualification, and if not proved, shall expunge the name from the list: the barrister may also rectify mistakes and supply omissions in the lists.

S. 43. The barrister may insert in the county lists the names of claimants who have given notice of their claim omitted by the overseers, on proof of notice and qualification.

S. 44. Overseers are to prepare lists of persons (other than freemen) entitled to vote in boroughs; such lists to be according to the Forms 1 and 2 in Schedule (I.), and to be published and kept for inspection.

S. 45. Places in which there are no overseers to be deemed in the parish or township next adjoining.

S. 46. The town clerk, or other chief officer, of cities or boroughs, are to prepare and publish the lists of freemen according to the Form numbered 3 in Schedule (I.)

S. 47. Persons omitted in the lists for cities or boroughs to give notice of their claims according to Form 4 in Schedule (I.), and notices as to persons not entitled to be retained in such lists according to Form 5 in Schedule (I.) Overseers to publish lists of claimants and persons objected to according to Forms 6 and 7 in Schedule (I.), and town clerks to publish lists of freemen claiming votes and objected to according to the Forms 8 and 9 in Schedule (I.)

S. 48. The returning officers for the city of London to issue precepts to the clerks of the several livery companies, requiring them to make out alphabetical lists according to the form in Schedule (K.); such clerks to sign the lists, and transmit them, with two printed copies, to the returning officers, who are to fix one copy in the Guildhall and one in the Royal Exchange; the clerks to have lists printed and kept for inspection: notices of omissions to be given to the returning officer according to Form 1 in Schedule (K.), and lists of persons claiming to be inserted to be made out and published according to Form 2 in Schedule (K.); notices of persons objected to, to be served according to Form 3 in Schedule (K.) In the city of London the poll of liverymen to be taken in the Guildhall.

S. 49. Judges of assize to name barrister to revise the lists of borough and city voters.

S. 50. Contains provisions as to the revisions of lists of city and borough voters similar to those in S. 42.

S. 51. Overseers to have power to inspect tax assessments; and the barrister to require the production of tax assessments and rates.

S. 52. Barrister to have the power of adjourning the court, of administering oaths, and to determine on the validity of claims and objections, and to settle and sign the lists in open court.

S. 53. The judges may appoint additional barristers if necessary.

S. 54. County lists to be transmitted by the barrister to the clerk of the peace; borough and city lists to be kept by the returning officer fairly

copied into a book, and given over to his successor. Such books to be deemed the register of the electors, and to be in force until the first of November in the following year.

S. 55. Copies of the lists and of the registers to be published for sale.

S. 56. Provides for the payment of the expenses of the overseers, clerks of the peace, &c.

S. 57. For remuneration to the barristers.

S. 58. The returning officer or his deputy at elections shall ask the following questions, if required by any candidate, and no other :

1. Are you the same person whose name appears as A. B. on the register of voters now in force for the county of [or, for the riding, parts, or divisions, &c., or, for the city, &c. as the case may be]?
2. Have you already voted, either here or elsewhere, at this election for the county of [or, for the riding, parts, or divisions of the county of , or, for the city or borough of as the case may be]?
3. Have you the same qualifications for which your name was originally inserted in the register of voters now in force for the county of, &c. [or, for the riding, &c., or, for the city, &c., as the case may be, specifying in each case the particulars of the qualification as described in the register]?

And the returning officer, if required so to do, may administer the following oath :

“ You do swear [or, being a Quaker or Moravian, do affirm] that you are the same person whose name appears as A. B. on the register of voters now in force for the county of [or, for the riding, parts, or divisions of the county of or, for the city or borough of as the case may be], and that you have not before voted, either here or elsewhere, at the present election for the said county [or, for the said riding, parts, or division of the said county, or, for the said city or borough, as the case may be.]

So help you God.”

No other oath as to qualification to be imposed and no scrutiny by any returning officer to be allowed.

S. 59. Persons excluded from the register by the barrister may tender their votes at the election to be entered as a disputed vote on the poll-book by the returning officer.

S. 60. On petition to the House of Commons the correctness of the register may be impeached, and the poll altered by the special committee, and the return amended by the House accordingly.

S. 61. Sheriffs of the divided counties to fix the time and to preside at elections.

S. 62. The polls at county elections to be open two days, for seven hours the first day and eight hours the second.

S. 63. Counties to be divided into districts for polling.

S. 64. Booths may be erected at the different polling places for counties,

but no voter to poll out of the district in which the property giving the qualification lies.

S. 65. Sheriffs may appoint deputies and clerks to take the polls; the latter to seal their books at the close of each day's poll, and deliver them to the sheriffs or their deputies; on the final close to be received by the deputies, and by them delivered to the sheriffs or under-sheriffs and opened, and the state of the poll declared on the next day but one after the close of the poll.

S. 66. Sheriffs in county elections may act in places of exclusive jurisdiction.

S. 67. The polls at contested elections for boroughs and cities to remain open as in county elections.

S. 68. Polling for boroughs in England to be at several booths, not more than 600 voting at one compartment in a booth: each person to vote at the booth appointed for his parish or district; and if the booths are at different places, a deputy to preside at each place: the poll books to be kept and opened by the returning officer as in county elections.

S. 69. Polling districts to be appointed for Shoreham, Cricklade, Aylesbury, and East Retford.

S. 70. Returning officers may close the poll before the expiration of the time fixed, where he might heretofore lawfully have done it: the poll may be adjourned from day to day in case of riot.

S. 71. Candidates, or persons proposing a candidate without his consent, to be at the expense of booths and poll clerks.

S. 72. Returning officers to prepare certified copies of the register of voters for each booth.

S. 73. Deputies to have the same power as the returning officers of administering oaths.

S. 74. Contains particular regulations for polling, &c. for the borough of Monmouth and for the contributory boroughs of Wales.

S. 75. All laws in force relating to elections to remain in full force, except where superseded by this act.

S. 76. Sheriffs, officers, barristers, and others, wilfully contravening any of the provisions of this act, liable to be sued in action of debt for the penal sum of £500.

S. 77. Writs, mandates, precepts, &c. issued for the election of members, to be framed conformably to this act.

S. 78. This act not to extend to the Universities of Oxford and Cambridge.

S. 79. Contains rules for the construction of different words used in this act.

S. 80. Contains provisions for deferring the preparations for the first registration in case the proposed Boundary Act should not pass before the 1st of June, 1832.<sup>1</sup>

<sup>1</sup> The act alluded to has since passed, but not so soon as here contemplated, consequently an order in council, under the provisions of this section, has been made, deferring the period of registration, &c. for this year.

S. 81. In case of a dissolution of parliament after the passing of the Boundary Act and before registration, the right of voting given by this act to take effect without registration.

S. 82. Contains provisions in case of a dissolution of parliament before the passing of the Boundary Act.<sup>1</sup>

*Schedules to which the foregoing Act refers.*

SCHEDULE (A.)

*(Boroughs Disfranchised.)*

Old Sarum, Wiltshire; Newtown, Isle of Wight; St. Michael's or Midshall, Cornwall; Gatton, Surrey; Bramber, Sussex; Bossiney, Cornwall; Dunwich, Suffolk; Ludgershall, Wiltshire; St. Maw's, Cornwall; Beeralston, Devonshire; West Looe, Cornwall; St. Germain's, Cornwall; Newport, Cornwall; Blechingley, Surrey; Aldborough, Yorkshire; Camelford, Cornwall; Hindon, Wiltshire; East Looe, Cornwall; Corfe Castle, Dorsetshire; Bedwin (Great), Wiltshire; Yarmouth, Isle of Wight, Hampshire; Queenborough, Kent; Castle Rising, Norfolk; East Grinstead, Sussex; Higham Ferrers, Northamptonshire; Wendover, Buckinghamshire; Weobly, Herefordshire; Winchelsea, Sussex; Tregony, Cornwall; Haslemere, Surrey; Saltash, Cornwall; Orford, Suffolk; Callington, Cornwall; Newton, Lancashire; Ilchester, Somersetshire; Boroughbridge, Yorkshire; Stockbridge, Hampshire; Romney (New), Kent; Hedon, Yorkshire; Plympton, Devonshire; Seaford, Sussex; Heytesbury, Wiltshire; Steyning, Sussex; Whitchurch, Hampshire; Wootton Bassett, Wiltshire; Downton, Wiltshire; Fowey, Cornwall; Milborne Port, Somersetshire; Aldeburgh, Suffolk; Minehead, Somersetshire; Bishop's Castle, Shropshire; Okehampton, Devonshire; Appleby, Westmoreland; Lostwithiel, Cornwall; Brackley, Northamptonshire; Amersham, Buckinghamshire.

SCHEDULE (B.)

*(Boroughs to Return One Member Only.)*

Petersfield, Hampshire; Ashburton, Devonshire; Eye, Suffolk; Westbury, Wiltshire; Wareham, Dorsetshire; Midhurst, Sussex; Woodstock, Oxfordshire; Wilton, Wiltshire; Malmesbury, Wiltshire; Liskeard, Cornwall; Reigate, Surrey; Hythe, Kent; Droitwich, Worcestershire; Lyme Regis, Dorsetshire; Launceston, Cornwall; Shaftesbury, Dorsetshire; Thirsk, Yorkshire; Christchurch, Hampshire; Horsham, Sussex; Great Grimsby, Lincolnshire; Calne, Wiltshire; Arundel, Sussex; St. Ives, Cornwall; Rye, Sussex; Clitheroe, Lancashire; Morpeth, Northumberland; Helston, Cornwall; North Allerton, Yorkshire; Wallingford, Berkshire; Dartmouth, Devonshire.

SCHEDULE (C.)

*(Places to be Boroughs and return Two Members.)*

Manchester, Lancashire, (*Returning Officers*, the Boroughreeve and Constables of Manchester). Birmingham, Warwickshire, (*Ret. Officers*, the Two Bailiffs of Birmingham). Leeds, Yorkshire, (*Ret. Officer*, the Mayor of Leeds). Greenwich, Kent. Sheffield, Yorkshire, (*Ret. Officer*, the Master Cutler). Sunderland, Durham. Devonport, Devonshire. Wolverhampton, Staffordshire, (*Ret. Officer*, Constable of the Manor of the Deanery of Wolverhampton). Tower Hamlets, Middlesex. Finsbury, Middlesex. Mary-le-bone, Middlesex. Lambeth, Surrey.

<sup>1</sup> See note, *ante*, p. 270.



Bolton, Lancashire, (*Ret. Officers*, the Boroughreeves of Great and Little Bolton). Bradford, Yorkshire. Blackburn, Lancashire. Brighton, Sussex. Halifax, Yorkshire. Macclesfield, Cheshire, (*Ret. Officer*, the Mayor of Macclesfield.) Oldham, Lancashire. Stockport, Cheshire, (*Ret. Officer*, the Mayor of Stockport). Stoke-upon-Trent, Staffordshire. Stroud, Gloucestershire.

## SCHEDULE (D.)

*(Places to be Boroughs and return One Member.)*

Ashton-under-Lyne, Lancashire, (*Returning Officer*, the Mayor of Ashton-under-Lyne). Bury, Lancashire. Chatham, Kent. Cheltenham, Gloucestershire. Dudley, Worcestershire. Frome, Somersetshire, Gateshead, Durham. Huddersfield, Yorkshire. Kidderminster, Worcestershire, (*Ret. Officer*, the High Bailiff of Kidderminster). Kendal, Westmoreland, (*Ret. Officer*, the Mayor of Kendal). Rochdale, Lancashire. Salford, Lancashire, (*Ret. Officer*, the Boroughreeve of Salford.) South Shields, Durham. Tynemouth, Northumberland. Wakefield, Yorkshire. Walsall, Staffordshire, (*Ret. Officer*, the Mayor of Walsall). Warrington, Lancashire. Whitby, Yorkshire. Whitehaven, Cumberland. Merthyr Tydvil, Glamorganshire.

## SCHEDULE (E.)

*(Places in Wales to share in Elections with Shire Towns or Principal Boroughs.)*

Amlwch, Holyhead, and Llangefni, sharing with Beaumaris, Anglesey.  
Aberystwith, Lampeter, and Adpar, sharing with Cardigan, Cardiganshire.  
Llanelly, sharing with Caermarthen, Caermarthenshire.  
Pwllheli, Nevin, Conway, Bangor, Criccieth, sharing with Caernarvon, Caernarvonshire.  
Ruthin, Holt, Town of Wrexham, sharing with Denbigh, Denbighshire.  
Rhyddlan, Overton, Caerwis, Caergwrely, St. Asph, Holywell, Mold, sharing with Flint, Flintshire.  
Cowbridge, Llantrissant, sharing with Cardiff, Glamorganshire.  
Llanidloes, Welsh Pool, Machynlleth, Llanfyllin, Newtown, sharing with Montgomery, Montgomeryshire.  
Narberth, Fishguard, sharing with Haverfordwest, Pembrokeshire.  
Tenby, Wiston, Town of Milford, sharing with Pembroke, Pembrokeshire.  
Knighton, Rhayder, Kevinleece, Knucklas, Town of Presteigne, sharing with Radnor, Radnorshire.

## SCHEDULE (E. 2.)

*(Places sharing in the Election of Members, also the Places therein from which the Seven Miles are to be calculated.)*

Newport, from the Market Place. Usk, from the Town Hall. Aberystwith, from the Bridge over the Rheidal. Lampeter, from the Parish Church. Adpar, from the Bridge over the Teivi. Pwllheli, from the Guildhall. Nevin, from the Parish Church. Conway, from the Parish Church. Criccieth, from the Castle. Ruthin, from the Parish Church called St. Peter's. Holt, from the Parish Church. Rhyddlan, from the Parish Church. Overton, from the Parish Church. Caerwis, from the Parish Church. Caergwrely, from the Parish Church of Hope. Cowbridge, from the Town Hall. Llantrissant, from the Town Hall. Tenby, from the Parish Church. Wiston, from the Parish Church. Knighton, from the Parish Church. Rhayder, from the Market Place. Kevinleece, from the Parish Church. Knucklas, from the site of the ancient Castle of Cnweglas. Swansea, from the

Town Hall. Loughor, from the Parish Church, Neath, from the Town Hall. Aberavon, from the Bridge over the Avon. Kenfig, from the Parish Church of Lower Kenfig.

SCHEDULE (F)

*(Counties to be divided into Two Divisions, and return Two Members for each.)*

Cheshire, Cornwall, Cumberland, Derbyshire, Devonshire, Durham, Essex, Gloucestershire, Kent, Hampshire, Lancashire, Leicestershire, Norfolk, Northumberland, Northamptonshire, Nottinghamshire, Shropshire, Somersetshire, Staffordshire, Suffolk, Surrey, Sussex, Warwickshire, Wiltshire, Worcestershire.

SCHEDULE (F. 2.)

*(Counties to Return Three Members each.)*

Berkshire, Buckinghamshire, Cambridgeshire, Dorsetshire, Herefordshire, Hertfordshire, Oxfordshire.

SCHEDULE (G.)

*(Cities and Towns and Counties thereof, with the Counties in which they are to be included.)*

Caermarthen, in Caermarthenshire. Canterbury, in Kent. Chester, in Cheshire. Coventry, in Warwickshire. Gloucester, in Gloucestershire. Kingston-upon-Hull, in the East Riding of Yorkshire. Lincoln, in the Parts of Lindsey, Lincolnshire. London, in Middlesex. Newcastle-upon-Tyne, in Northumberland. Poole, in Dorsetshire. Worcester, in Worcestershire. York and Ainsty, in the North Riding of Yorkshire. Southampton, in Hampshire.

CAP. 46.—An Act to enable his Majesty, his heirs and successors, to appoint a Trustee of the British Museum. [23d June, 1832.]

CAP. 47.—An Act for holding the Assizes for the County of Norfolk and for the City of Norwich, and County of the same City, twice in every Year at Norwich. [23d June, 1832.]

S. 1. From the first of January, 1833, all the commissions of assize and nisi prius, and all general commissions of oyer and terminer and of general gaol delivery, to be held for the city of Norwich and county of the said city, and for the county respectively, shall be held for the city at and in the said city, and for the county in the shire-house at the castle of Norwich: and the said commissions shall be appointed and executed twice in every year, at or about the usual times for holding the lent and summer assizes respectively.

S. 2. If at any time hereafter the said city or the shire-house shall be wholly unfit for holding assizes there by accident of fire, or by means of any contagious or epidemical distemper, or reason of any civil tumults or disorder, or the danger or reasonable apprehension thereof, or of any other unforeseen cause or exigency, the same to be made to appear to the Lord Chancellor, or Lord Keeper, or Lords Commissioners of the Great Seal for the time being; in such cases only it shall be lawful for the said Lord Chancellor, &c., with the advice of the justices of assize, from time to time during the continuance of such exigencies, to appoint some other convenient place within the county of Norfolk for holding the said assizes.

- CAP. 48.—An Act to regulate the Office of Clerk of the Crown in the Court of King's Bench in Ireland. [23d June, 1832.]
- CAP. 49.—An Act to extend the Provisions of an Act of the Fifty-seventh Year of his Majesty King George the Third, for regulating the Office of Clerks of the Signet and Privy Seal. [23d June, 1832.]
- CAP. 50.—An Act to suspend until the End of the next Session of Parliament the making of Lists and the Ballots and Enrolments for the Militia of the United Kingdom. [23d June, 1832.]
- CAP. 51.—An Act to regulate the Practice and the Fees in the Vice-Admiralty Courts abroad, and to obviate Doubts as to their jurisdiction. [23d June, 1832.]
- CAP. 52.—An Act to promote the Improvement of a District of Mountain Land in the Counties of Limerick, Cork, and Kerry, in Ireland, by making new Roads through the same, and to encourage the Employment of the poor Inhabitants thereof. [23d June, 1832.]
- CAP. 53.—An Act for consolidating and amending the Laws relating to Army Prize Money. [23d June, 1832.]
- CAP. 54.—An Act for making Provision for the Dispatch of the Business now done by the Court of Exchequer in Scotland. [23d June, 1832.]
- CAP. 55.—An Act to apply the Sum of Four Millions out of the Consolidated Fund, to the Service of the Year One Thousand Eight Hundred and Thirty-two. [23d June, 1832.]
- CAP. 56.—An Act to extend the Jurisdiction of the Commissioners acting in the Execution of Three Acts for Paving and Regulating the Regent's Park and several Streets and Places in Westminster, to certain other Streets and Places in Westminster, and for other purposes. [23d June, 1832.]
- CAP. 57.—An Act to continue and extend the Provisions of an Act passed in the Fifty-ninth Year of his Majesty King George the Third, for giving additional Facilities in Applications to Courts of Equity regarding the Management of Estates or Funds belonging to Charities; and for making certain Provisions respecting Estates or Funds belonging to Charities.
- S. 1. Commissioners appointed under the 1 and 2 Wm. 4, c. 34, authorized to make certificates to the attorney-general, as commissioners under former acts were empowered to do.
- S. 2. In proceedings instituted by the attorney-general, in pursuance of the 58 and 59 Geo. 3, s. 2, or of this act, the attorney-general's certificate shall be deemed sufficient evidence that the particulars of cases have been duly certified by the commissioners.
- S. 3. Where the persons in whom real property has been vested in trust for any charity are dead, the courts of chancery or exchequer on petition may direct two advertisements to be inserted in the London Gazette and country newspaper, giving notice that the representative of the last surviving trustee do, within twenty-eight days, appear or give notice of his title to the master, and prove the same; or if no person appear, or title is not proved within thirty-one days after appearance, the courts may appoint new trustees, and direct conveyances to be made accordingly.

S. 4. Where the property belonging to any charity consists of annuities or rent charges, not exceeding in the whole £20 per annum, and where there are no existing trustees, any five of the commissioners may, by writing under their hands and seals, empower the resident minister and churchwardens to receive the annuities, &c. and apply them to the purposes of the charity.

CAP. 58.—An Act to extend the Provisions of an Act of the First Year of the Reign of his present Majesty, for altering and amending the Law regarding Commitments by Courts of Equity for Contempts, and the taking Bills pro Confesso; and to explain certain Parts thereof.

[23d June, 1832.]

S. 1. In all cases of contempt other than those provided for by the 7 Geo. 4, c. 57, where any person shall be in prison under any commitment or attachment issued out of the courts of chancery or exchequer, the court, on application of the person committed, may discharge the contempt except as to costs, for which he shall still remain in custody, provided that this act shall not weaken any of the powers given by the 1 Wm. 4, c. 36, or by the 7 Geo. 4, c. 57.

## SKETCH OF THE STATE OF LEGISLATION IN GERMANY.

[Written in German for the *Law Magazine*, and translated by the Editor.]

THE legislative activity in the different states of Germany varies in its direction according to the varying political relations of those states. In all countries where the constitutional principle prevails—in which the people stand upon a higher grade of political cultivation, and are striving more powerfully to confirm and extend their rights—they look more to England and France as to those states in which the foundations of greater degrees of liberty are laid, and whose judicial arrangements have more in view the independence of the courts, the protection of civil liberty from all attacks of the government, and the participation of the people in the administration of justice. Accordingly, in Bavaria, Wirtemberg, Baden, and Hesse, the dissatisfaction with the existing institutions is much greater than in other German states, and the general voice is more in favour of institutions formed on the model of the English and French. In these countries, therefore, publicity, oral pleading, and trial by jury in criminal cases, are demanded. The governments, however, still look with a certain degree of anxiety upon this growing power of the people, and seek, on that account, to make as few concessions as possible. The old German lawyers, also, are too much accustomed to the hitherto existing forms, and too little acquainted with foreign institutions; so that the slowest possible alterations are proposed.

All new legislative undertakings of the states of southern Germany, which, in other respects, are in conformity with the new ideas, contain for this reason mixtures of the old and the new; the object of which is to render the new institutions as harmless as possible.

By far the most advanced in legislation is Bavaria, where a criminal code, framed in 1813 by the celebrated Fenerbach, is still in force. This code, although framed with particular clearness, precision, and comprehensiveness, did not give satisfaction. The lawgiver had reckoned too much on the apprehension to be excited by severe punishment, and consequently threatened punishments which were out of proportion to the offence; at the same time the discretion of the judge was too much limited, since, whatever grounds of alleviation might present themselves, the judge could not depart in the slightest respect from the punishment fixed by the code. In criminal prosecutions, secret and written procedure prevailed, and the accused, when he refused to answer, was punished by blows. So early as 1822 and in 1827, new projects were laid before the Chambers, but were not discussed. In 1831 new projects were communicated to the Chambers. The project of the code of punishments is much simpler and milder than the code. The punishment of death occurs less frequently; the punishment of beating (*prügel*) is abolished. The procedure is particularly important. Public and oral proceedings are more prevalent, so that when the accusation is established (*i. e.* in English phrase, when a true bill is found), the accused and all the witnesses are heard in the presence of all the judges, and then sentence is pronounced. To imitate trial by jury in some measure, the plan is, that five judges, members of the criminal court, should decide, as judges of the fact, whether the accused has perpetrated it, and, if the answer be in the affirmative, that four other judges should fix the punishment.

In Wirtemberg there is no new code as yet, but they follow the so-called common law, that is, a mixture of Roman, Canon and German law. In the year

1830, the plan of a criminal-procedure ordinance was laid before the States, in which all the old secret-written procedure is to be found; only, to give the people some semblance of publicity, a public final proceeding is introduced, in which an abstract of all the written proceedings is laid before the judges, and the defender publicly produces his defence. Far more important is the project of a criminal code announced by the ministry in Wirtemberg during the present year. In many instances it is framed after the Bavarian code of 1813, but is much simpler and milder, and, in particular, many regulations which belong rather to a compendium than a code, are left out.

In Baden, since 1809, the French Code Civil, with some modifications, has been in force.<sup>1</sup> The other French codes, however, have not been adopted; but in criminal law and civil procedure, the so-called common law, and particular laws which do not harmonize very well together, have been in force: so that the law has been involved in greater confusion. During the session of 1831, a code of civil procedure was proposed, and introduced in 1832. It sanctions the principle of publicity. A criminal code and a code of criminal procedure are preparing; both projects must be laid before the chambers at their next meeting. The law-commission charged with it propose the introduction of publicity, oral pleading, and jury trial. The Baden session of 1831, however, had exercised a powerful influence on the development of legislation. The concord amongst the deputies gave them a degree of strength which enabled them to carry many important laws; for instance, a law relating to the press, by which the censorship was as good as repealed, and the freedom of the press legally established; a municipal ordinance, by which the freedom of the towns and villages was recognised; a law abolishing the punishment of corporal chastisement; a libel law, and a law as to the abolition of *corvées*. At the same time a law was prepared for the abolition of tithes. It was found that all provisions for buying them up had hitherto been ineffective, because the sum was too high for the payers, and it was therefore proposed that, all citizens being interested in their abolition, a third part of the compensation-money should be paid by the state.

In the Grand Duchy of Hesse, great legislative preparations have been made, but nothing is yet completed. In the Electorate of Hesse, the States have been assembled for more than a year, and many important projects taken into consideration by them; but the government is somewhat wanting in goodwill, so that no law has yet been passed.

The legislative activity bears a different character in states which have no constitutions, and where, consequently, legislation emanates purely from the government. In all these countries, the striving after institutions which are more connected with political freedom is less perceptible. The institutions of publicity and trial by jury are less known to the people; and, in a happy confidence in the government, less care is taken to prevent it from abusing its power. For this reason, legislation advances slowly, and busies itself principally with the tardy improvement of existing institutions and the abolition of the most violent abuses. To this class belongs the legislation of Austria and Prussia. Complete codes already exist in both countries. In Austria, particularly, a civil code is in force which was published in 1811, and is the fruit of many years labour. It is distinguished by simplicity and clearness; and, by keeping clear of many legal notions of Roman origin, has attained to a far greater degree of reasonableness than other codes.

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<sup>1</sup> i.e. Under a different name.—EDIT.

The Code of Punishment of 1803 is likewise simple and mild, it is true, but not answering to the demands of the time. The Code of Civil Procedure, which originated in the times of the Emperor Joseph, is certainly directed to the shortening of proceedings, but it does not give satisfaction. The labours of the Law Commission are now directed to a Code of Commerce and to the Codes of Civil Procedure and of Punishment. The projects have appeared. Professors Jenull and Wagner have had a considerable share in them.

In Prussia, a code remarkable for its completeness—for its object was to anticipate all possible cases—is in force under the name of *Landrecht*, in which also a Code of Commerce and a Code of Punishment are comprised. The necessity for simplification is felt, and a revision of the Code of Punishment is in progress, the provisions of which are extremely harsh. Peculiarly deserving of attention is the Prussian rule of Court—distinguishing the Prussian procedure from all others—that the Judge shall establish the truth and instruct the parties as in criminal procedure; from which it is clear the Prussian legislators wished to banish the advocates as much as possible, by making the judge the counsellor of the litigants. Against the practicableness of this plan many voices have been raised even in Prussia itself, and many projects are in agitation for the alteration of the procedure. In criminal procedure, the criminal ordinance of 1805 is in force. The complaints against it are, that it ordains an entirely secret mode of proceeding, and permits the judges to prescribe an extraordinary punishment when they hold the guilt of the accused not for certain but probable. Through the connection of Old Prussia with the Rhenish provinces, where the French procedure still prevails, a large party has become powerful, which declares for publicity and jury trial.<sup>1</sup> A new project of a criminal ordinance has been prepared but has not yet been made public.

The kingdom of Saxony and Hanover form an intervening class in respect of the state of legislation. In both states men cling much to the old institutions, and fear to meddle with the law. Their progress is consequently slow; but even in Saxony and Hanover the public cry for reform has gained strength, and legislative improvements are called for. The kingdom of Saxony first received a constitution in 1830, and it is known that a constitutional existence takes some time to mature. Of new laws in Saxony, the most important are, a new regulation of the States of 1832, and a law (1832) on the abolition of the feudal tributes (*corvées*) of the peasantry.<sup>2</sup> In Hanover, where a new Constitution has just been proposed, the project of a Criminal Code, founded on the model of the Bavarian Code, but containing many improvements, has been laid before the States. Every where a great legislative activity is excited, but the will is not uniformly good, and a certain fear of novelty prevents radical reforms from being made.

(Signed) MITTERMAYER.

(Law Professor at Heidelberg, Member of the Second Chamber of Baden, and Author of a great number of highly esteemed Juridical Works.—*Edit.*)

<sup>1</sup> We see from the German papers that the introduction of the French system of Civil Procedure has been warmly advocated of late.—*Edit.*

<sup>2</sup> The codification controversy has recently been revived in Saxony.—*Edit.*

## EVENTS OF THE QUARTER.

THE measures now in progress, in which our readers are most likely to be interested, are the General Register Bill and Chancery Reform. We therefore take them first.

The Committee of the House of Commons appointed to inquire into the expediency of a General Register, came to a definitive resolution on the 16th instant, and their Report will probably be in the hands of many of our readers before this Number appears. It is drawn up by Mr. William Brougham, and, generally speaking, is favourable to the Bill. The Committee, it is said, were very nearly unanimous. We shall review this Report in our next number, and avail ourselves of the same opportunity to examine some "Notes Explanatory of the Regulations," &c. that have recently appeared.

Chancery Reform has made very little progress since our last. Only one of the expected Bills has been brought in by Mr. Spence,<sup>1</sup> that for the administration of the personal estate of deceased persons by citation; but the object of this Bill has been considerably extended since we first mentioned it. The present intention is to extend proceedings by citation to bills for specific performance, for taking accounts between partners or their representatives, and other simple matters of account, and to bills for foreclosure and redemption. The Bill, however, will only be imperative in regard to the administration of personal assets, at least for the present: in the other cases the plaintiff will merely have the option of proceeding by citation if he likes. The other promised Bill will be brought in by the Chancellor; but we much doubt whether he himself could say when. The delay is partly attributable to his having a new sort of appellate jurisdiction in contemplation. An imperfect notion of his intentions regarding it may be caught from the concluding portion of a speech, made on the 12th of May last, on the occasion of his temporary retirement. After mentioning the state of the arrears, he is reported to have proceeded as follows:—"I may venture to state that I could, over and over again, have been perfectly excused for not keeping the field, if I may so speak; though I might have had very good excuses for not coming into court at all, I felt it my duty so to do, and it is a very great satisfaction to me that I have been able to leave the business in the state I do. I had hoped to have been able to perfect an arrangement without application to the legislature, which would have produced, in my opinion, the salutary and most beneficial effects of an act for certain purposes, for simplifying some of the most important business of jurisdiction, composed of the three heads of the equitable jurisdiction of Westminster Hall, voluntarily sitting. It is no fault of mine that that wish has not been accomplished. I hope and trust I shall live to see it accomplished, as I hope and trust I shall live to see another wish accomplished,

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<sup>1</sup> We are sorry to see that Mr. Spence is not to be returned for Ripon in the next Parliament. The patroness of that borough has changed her opinions a shade or two, and intends giving her interest to more decided conservatives. Considering how unremittingly Mr. Spence has laboured in the cause of Chancery Reform, and how much his disinterested zeal has contributed to keep other people to their work, his retirement at the present juncture must be regarded as a national loss.



which, it is known to many of my colleagues, has long been near to my heart—to see the great and necessary improvement in this country of the equitable jurisdiction of the Chancellor severed from all his political functions. Upon quitting this Court I should, in ordinary circumstances, feel nothing but the pain of parting with those from whom, having always received unvaried respect and kindness, I certainly feel my tribute of kind and respectful thanks most justly due. But on my voluntary retirement from office, and after I am separated under the only pain which it gives me—I mean of the separation that I have mentioned—I am supported by the principles which dictate the course I pursue—I am more than supported. The personal feelings to which I have adverted are lost in the public sense of duty under which I act, and which compels me, I trust without any undue feelings of pride, to regard the abandonment of power to the commandments of duty, not as a misfortune, but a glory.”

The plan here alluded to is to form the Chancellor, the Vice-Chancellor, and the Master of the Rolls, into a court of appeal. The main objection is the obvious necessity of having one equity judge constantly sitting for the dispatch of ordinary business; which can only be managed by relieving the Chief Baron of the Exchequer from all the common law business of his Court, or creating a new equity judge. If the business goes on increasing at the present rate, one of these measures will most probably be resorted to. The separation of the political and judicial duties of the Chancellor, is a measure of indisputable expediency, so far as the mere administration of justice is concerned; and the objections to it, on other grounds, have always struck us as comparatively light. The scheme, however, will be found rather difficult of execution.

The Fourth Common Law and the Third Real Property Reports, both of which have appeared within the last three months, occupy too large a portion of this number to require any notice in this place. The Fourth Real Property Report, on Wills and Testamentary matters, is preparing. The most important subject about which the Common Law Commissioners are expected to busy themselves next, is that of Local Courts. We know nothing of their views concerning it; but four of the Commissioners having been appointed by Lord Brougham, some coincidence of opinion may be anticipated. A cheap and uniform system of local judicature is undoubtedly required; and it is now well known that the only effectual opposition formerly encountered by Lord Althorp and Sir Robert Peel, in their attempts to establish Small Debt Courts, originated with the officers of the Superior Courts, who, reasonably enough, conceived their fees to be in danger. Our only fear is, that the jurisdiction of the County Courts, or of any new tribunals that may be formed, will be extended too far.

The Real Property Bills, the Arbitration Bill, and Mr. Baring's Bill to limit the Privileges of Members of Parliament, are still pending; and a Bill to supersede the Court of Delegates, in compliance with the suggestions of the Ecclesiastical Report, has recently been brought in by Lord Brougham. The Uniformity of Process Bill has passed, and will be found in our Abstract of the Statutes. A set of Orders, made under the 14th section of the Act, have been settled by the Judges, and are daily expected to appear. The Act for Abolishing the Punishment of Death in certain cases has also passed, and may be hailed as a sign of the awakening spirit of the times.<sup>1</sup>

<sup>1</sup> This Act was not printed soon enough to be included in our Abstract of Statutes. It abolishes the punishment of death for horse, sheep and cattle stealing.

Some important matters, connected with law, have also been before parliament in the shape of motions. Such are Mr. Whittle Harvey's motion as to the Inns of Court, and Mr. John Wood's motion to reduce the Salaries of the Chief Justices and the Chief Baron. Mr. Harvey's motion forms the subject of an independent article; but, since that article was written, he has published his speech and reply as a pamphlet, with a prefatory address to his constituents, from which it appears that he is not to have either secretaryship or solicitorship to the Charity Commission after all. Some letters relating to the causes of his rejection by the Benchers are annexed; but professional opinion is now thoroughly made up as to the propriety of that rejection. Were there only one verdict unfavourable to his character, some charitable people might presume that verdict to be wrong; but it is rather too much to expect the public to discredit two verdicts. The less Mr. Harvey says about his own case the better, if he really wishes well to the Bar.<sup>1</sup>

Mr. Wood's object is doubtless a highly laudable one, but we see no necessity for the reduction proposed. Few men work harder for their salaries than the judges in question, and it is poor economy to diminish the chances of getting first-rate men to preside upon the Bench.

With regard to the administration of justice in the colonies, the only motion of importance made within the last quarter is one by Mr. H. L. Bulwer, prefaced by a speech of great information and ability, for (amongst other objects) establishing trial by jury in New South Wales. Lord Howick stated in reply that the measure was already in the contemplation of government, upon which Mr. Bulwer withdrew so much of his motion as related to it.

Four men of the very highest celebrity, members of the legal profession, have died within the last three months: Sir James Mackintosh, Mr. Jeremy Bentham, Mr. Charles Butler, and Sir William Grant. We have told all we know worth telling of Sir James Mackintosh in another place, and we shall be silent as to Mr. Bentham's juridical character until the promised autobiography appears.<sup>2</sup> The following brief memoirs contain the little we have been able to collect concerning the remaining two.

Mr. Charles Butler was the son of a haberdasher in Pall Mall. The shop bore the sign of the Golden Ball, and is frequently mentioned in Miss Burney's novels as a common place of resort for the fashionables of the day. The business was certainly

and for stealing to the value of five pounds in a dwelling-house; and enacts that every person convicted of any of the above offences shall be transported for life, The 2nd section limits the periods within which convicts may be pardoned by Colonial Governors.

<sup>1</sup> Mr. Harvey has placed the following testimony, by way of motto, on his title-page: "In my opinion Mr. Harvey is the subject of greatest slander of all men that live on the face of the earth."—*Sir Samuel Shepherd*. Sir Samuel Shepherd was Mr. Harvey's counsel, and this sentence is taken from his speech at the trial. Mr. Harvey has since moved that the Common Law Commissioners be directed to inquire into the present mode of calling to the Bar. The votes were twenty-six for the motion and two against it.

<sup>2</sup> The foreign journals have been writing strange things about him. For instance, *Der Freimuthige* (a German paper) begins a life of him thus: "Jeremy Bentham is the son of an advocate of great celebrity. At the school of Eton and the college of Westminster he distinguished himself above his fellows," &c.

a profitable one, for Mr. Butler inherited a fortune of little less than 30,000*l.* Being a Catholic, he received the principal part of his education at Douay, where his residence must have been more than usually prolonged, as he did not enter at Lincoln's Inn till the twenty-fifth year of his age. At the time Mr. Butler entered the profession, a Catholic was not admissible to the Bar: he therefore practised under the Bar as a conveyancer, until after the passing of the act (31 Geo. 3.) substituting a declaration against certain "damnable" doctrines for the oath against transubstantiation formerly imposed on all Barristers.<sup>1</sup> He appears to have been in full practice as far back as living memory extends—for the last forty years at least. There can be no stronger evidence of this than the number of eminent men who were his pupils. Amongst others may be named the present Attorney-General, Mr. Brodie, Mr. Walters, Mr. Duval, and Mr. Preston. It was at the instance of the Attorney-General that he was made a King's Counsel a short time preceding his death. The works by which Mr. Butler is best known to the profession are his *Notes to Coke upon Littleton* and his edition of *Fearne*. Our opinion of his merits as a legal writer has been given in former volumes of this Magazine.<sup>2</sup> His contributions to general literature are too numerous to characterise, even were it our province to consider them. He has himself given a full account of his various labours in his *Reminiscences*. The motto from Cicero, which he was so fond of prefixing to his works, was strictly applicable. Almost all the time he could spare from his profession was devoted to reading and composition. His habits were regular and temperate in the extreme. His usual hour of rising, down to a late period of his life, was four. He sometimes amused himself with playing on the pianoforte, and he has occasionally been heard to sing at a convivial party. His library at Great Ormond Street was a remarkably choice collection; and he made it subservient to the concoction of his numerous publications on general literature, which are chiefly compiled from standard works. For instance, his life of Fenelon is abridged from that by Bossuet, and his *Life of Erasmus* from the volumes of Knight and Jortin. The same remark applies to the "*Horæ Biblicæ*" and "*Horæ Juridicæ Subsecivæ*." The following anecdote was sent us by one intimately acquainted with him.

At an early part of his professional career he was employed by Lord Sandwich (First Lord of the Admiralty in Lord North's administration), to compose a speech in defence of the legality of Press Warrants. On the same evening that Lord Sandwich delivered the speech in question, Butler, after hearing it, joined a party, where, upon his mentioning that he had just come from the House of Lords, he was asked how Lord Sandwich had acquitted himself. Butler replied, "I have listened so attentively that I think I can tell you nearly the whole of what he said;" and immediately repeated the speech verbatim, to the astonishment of his hearers, who were not in the secret of its being his own composition.

Charles Butler's physiognomy was not prepossessing, and would have set at defiance the skill of Lavater. Its chief characteristic was imperturbable quietude. He was, in truth, not susceptible of any strong emotion. Dr. Johnson blamed Goldsmith for expunging from his "*Vicar of Wakefield*" the following passage: "I hate a man who is zealous for nothing." This was precisely the case with Charles Butler, whose moral character was unimpeachable, whose temper it was

<sup>1</sup> This wretched mummery of oaths and declarations still forms a part of the ceremony of being called to the Bar, and the distinction between Catholics and Protestants is retained.

<sup>2</sup> Vol. i. pp. 27. 120. Vol. iv. p. 115.

difficult to ruffle, but who might be justly described as being "zealous for nothing." Pope's description seems made for him :—

" In moderation placing all my glory,  
Whilst Tories call me Whig, and Whigs a Tory."

Butler when talking with Whigs would have been thought a Whig, and with Tories a Tory. To the former he would praise Charles Fox, with the latter William Pitt would be the theme of his eulogy. In a word, he was "all things to all men," without, however, any other motive than a wish to conciliate the good-will of his hearers of every party. The same sort of moral cowardice is discernable in his works.<sup>1</sup> In private life, it is almost unnecessary to add, he was a perfectly amiable, good-tempered and good-natured man. He was 82 when he died. His patrimonial property was found rather impaired than augmented at his death ; which, considering his large professional income and inexpensive habits, is probably the most singular circumstance relating to him.

Sir William Grant was a member of one of the old Scottish families of that name, and was educated by an uncle for the Bar, though never, it would seem, at a British university. After entering at Lincoln's Inn and pursuing his legal studies for a time, but before being called to the Bar, he repaired to Canada and practised as an advocate there. He received the appointment of Attorney-General at Canada at the early age of twenty-five, but finding the field too limited, he soon afterwards returned to England, and was regularly called to the Bar.<sup>2</sup> He first attended the Common Law Courts, and went the Home Circuit, but with very indifferent success, for his manners were shy and retired, and he was entirely destitute of English connection. He first grew into notice as counsel in Scotch Appeal Cases before the House of Lords. Lord Thurlow (then Chancellor) is reported to have been particularly struck with him, and to have remarked, on one of his early appearances, to a bystander, "Be not surprised if that young man should one day occupy this seat." It was by Lord Thurlow's advice that he gave up the Common Law for the Equity Courts, and also, it is supposed, through Lord Thurlow's recommendation, that his first seat in parliament and his first legal honours were obtained. He was first returned for Shaftesbury, then for Windsor, and latterly for the shire of Banff in Scotland. He was generally reckoned amongst the most effective of the parliamentary supporters of Pitt, and had more than once the honour of being singled out as the personal antagonist of Fox. The occasion on which he most distinguished himself was when the subject of a new system of laws for Canada was discussed ; an occasion, however, on which his local knowledge must have contributed in no slight degree to his success. His parliamentary appears to have re-acted very forcibly on his professional reputation, for his practice was not extensive till he had begun to distinguish himself in the House. He certainly became King's Counsel, probably through his interest with Lord Thurlow or Mr. Pitt, when he had comparatively little to do, and acquired his other honours, though no man deserved them better, with a rapidity which it generally requires no slight portion of political influence to bring about. After successively filling the appointments of Solicitor-General to the Queen

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<sup>1</sup> See, for instance, his *Remarks on the Codification Controversy*, quoted *Law Mag.* vol. iv. p. 123. We are sorry to say that our review of his *Life of D'Aguesseau*, written at his own request, made him very angry.

<sup>2</sup> During the siege of Quebec by General Montgomery, Mr. Grant threw aside the forensic character, and commanded a body of volunteers.

Chief Justice of Chester, and Solicitor-General to the King, he was made Master of the Rolls on the retirement of Lord Alvanley ; a situation which he held until his final retirement from public life—a space of sixteen years—though the option, it is said, was presented to him on more occasions than one, of being elevated to the Chancellorship.<sup>1</sup> Perhaps no Judge ever discharged the duties of his Court better, or left it amidst tokens of such universal regret. On the 23rd of December, 1817, Sir William Grant, having some time previously announced his intention of retiring from his office, sat at the Rolls for the last time ; and, after he had delivered his judgment in the case of *Scott v. Porcher*, the only case heard before him which was then undecided, Sir Arthur Pigott rose, and in the name of the Bar addressed his Honor as follows :—

“ Upon your retirement, Sir, from that seat of justice, in which for more than sixteen years you have presided, the Gentlemen of the Bar, attending this Court, are desirous of expressing the sentiments with which they are impressed on an occasion of great regret and concern to them ; and on which they wish to offer an unfeigned tribute of that respect which you have so abundantly merited, and to which you are so justly entitled.

“ The promptitude and wisdom of your decisions have been as highly conducive to the benefit of the suitor as they have been eminently promotive of the general administration of equity. In the performance of your important and arduous duties, you have exhibited an uninterrupted equanimity, and displayed a temper never disturbed, and a patience never wearied ; you have evinced an uniform and impartial attention to those engaged in the discharge of their professional duties here, and who have had the opportunity and enjoyed the advantage, of observing that conduct in the dispensation of justice, which has been conspicuously calculated to excite emulation, and to form an illustrious example for imitation.

“ Accept, Sir, the cordial and sincere wishes of those whom you leave devoted to the labours of this place, that, with the gratifying reflections that will be the inestimable reward of so considerable a portion of your life so meritoriously and exemplarily employed, you may enjoy health and happiness in repose, on your secession from business and labour, from the toils and anxieties of a painful judicial station, to the importance and eminence of which you have, in so great a degree, and in so distinguished a manner, contributed, and on which you have cast additional lustre.”

To which his Honor replied—

“ It is impossible that I should not be highly gratified by the favourable opinion which the Gentlemen of the Bar have been pleased to express of my conduct in the situation from which I am about to retire. For this and every other mark of their regard I thank them most sincerely. The kindness, the attention, the respect which I have uniformly experienced from them, will never be obliterated from my memory. My conduct towards them has been only that to which their own merit justly entitled them. I have always found them alike distinguished for their learning and knowledge in their profession, and for the honour and liberality which they have carried into the practice of it. The approbation of such men is truly valuable.

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<sup>1</sup> Most of the foregoing particulars are given on the authority of a letter in the *Standard* of May 30th, 1832, assumed to be written by one of Sir W. Grant's acquaintance, and bearing strong internal evidence of authenticity. It is to be regretted that the friends of eminent men do not more frequently follow this eloquent letter-writer's example.

I receive it with pleasure.—I shall remember it with gratitude.—Gentlemen, farewell ! my best wishes will ever attend you !”

The foregoing address of the Bar is sufficiently neat and germane to the occasion ; more so, perhaps, than addresses on the retirement of eminent judges have usually been ; but it gained nothing by the manner of its delivery. Sir Arthur Pigott read it from a paper with the same tone, emphasis, and apparent interest in the contents, which are wont to be exhibited by the officer at a trial *ad nisi prius* in reading a piece of documentary evidence, or by the clerk of the House of Commons when he dispatches a petition. Sir Arthur Pigott was the Father of the Bar ; he was considerably senior, both in years and standing, to the Judge whom he addressed, and he might possibly have been unable to divest himself entirely of the feeling that, but for the neglect of his own professional pretensions, or the ascendancy of the party to which he was politically opposed, he might himself have filled the situation from which he saw Sir William Grant retiring with dignity at a comparatively early season of life. The apathy of the organ of the Bar was contrasted by a burst of emotion which escaped from his Honor in the course of the few graceful sentences which he uttered in reply.<sup>1</sup>

The time which has elapsed since the retirement of Sir William Grant, has rendered his political and judicial career matter of history, respecting which public and professional opinion may be considered as in a great degree settled. As a politician, he was a staunch supporter of the powers that were ; a consistent opponent of all attempts to alter subsisting institutions ; an ingenious, and, in the days wherein he flourished, a successful apologist for some of the most questionable parts of those institutions. But it is as a Judge, that Sir William Grant will be chiefly known to posterity ; and of his transcendent merits as a Judge, there is but one opinion ; for the voice of the profession and of the public has unanimously recognized him as one of the greatest ornaments of the Equity Bench. He possessed in an eminent degree all the intellectual and moral qualities which enable a man to exercise the judicial functions with the greatest amount of benefit to the suitor, honour to himself, and satisfaction to the Bar. He was a thoroughly learned and accomplished lawyer, an acute reasoner, a clear expositor of facts, an eloquent speaker, and he united with all the higher qualifications for his office, the most imperturbable serenity of temper, powers of attention which no prolixity could exhaust, and a courtesy of demeanour which left him no petulance to restrain. He rarely interposed any observation in the course of an argument at the Bar ; but sat with an air of vacant abstraction, which might have been mistaken for inattention, but that his judgments uniformly furnished the most satisfactory evidence that nothing which deserved attention had escaped him. In this last particular there was a striking difference between the judicial demeanour of Sir William Grant and his great contemporary Lord Eldon. Both these Judges were distinguished by their courtesy to the Bar, and both were equally venerated and beloved, we might also say, by its members ; but the end was obtained by the most opposite means, for Lord Eldon was eminently interlocutory, and delighted to try his hand occasionally at the facete ; he was as remarkable, from time to time, for his jocular propensities, for his

Quips and cracks and wanton wiles,  
Nods and becks and wreathed smiles,

as was his Honor of the Rolls for his solemn taciturnity, and the unbending

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<sup>1</sup> As the writer of the letter in the Standard speaks of “ the manly and affectionate Address of Sir A. Pigott,” we have been at some pains to verify this account.

rigidity of his muscular organization. Under the presidency of these Judges the good understanding which prevailed between the Bench and the Bar, both in the Court of Chancery and at the Rolls, was perfect, nor was that concord ever interrupted by the *scenes* between Judges and Counsel, which sometimes tend to lower the dignity of the profession, waste the public time, and afford sport in the columns of newspapers for non-professional Philistines.

Sir William Grant appears to have diligently applied himself, during a residence of some duration at Leyden, to the study of the Civil Law; a solid and rational foundation for the education even of an English lawyer, and especially of a practitioner in our Courts of Equity. His judgments abound with illustrations derived from this source; many of them are distinguished by much of the terseness, conciseness and elegance (if we may be permitted to predicate elegance of things juridical) which characterise the best specimens of forensic style and reasoning in the Digest. *Hanson v. Graham* (6 Ves. 243), a case which occurred shortly after his appointment to the Rolls, furnishes an instance of the felicity with which he could make his knowledge of the principles of the Roman Law practically useful in his judicial decisions. But the use which he made of his knowledge of the Civil Law was wholly untinged with the pedantry which might lead to the abuse of such knowledge; hence he cautiously defined the limits within which it might be occasionally called in aid of the administration of our own laws. An instance of this caution may be seen in *Mason v. Mason* (1 Mer. 313,) a case involving a curious question of survivorship, where the argument *ex necessitate* seemed to furnish a very plausible ground for adopting a rule of the Roman Law. Sir William Grant's legal learning—we speak more especially with reference to that department of law, the knowledge of which can alone enable a Judge to preside in a Court of Equity with satisfaction to himself or benefit to the suitor—was not inferior to that of Lord Eldon, and it was under better discipline and control.

In looking to the result of many of Lord Eldon's most elaborate judgments in which he has exhausted all the learning that can be brought to bear on the point in question, and examined all the shades of distinction which render one case incapable of supporting another, we are sometimes tempted to exclaim that he is *magnus inter opes inops*, and that he has conducted us to a conclusion, wherein, as in the last chapter in *Rasselas*, nothing is concluded. Lord Eldon generally leaves the raw material as he finds it, and seems afraid of handling it lest its ear-mark should be destroyed. Sir William Grant's judicial method is neater and more scientific; and the coarse, heterogeneous material supplied by the authorities often receives an unexpected polish and symmetry from his hand. Where the law of the Court was subject to no definite or intelligible rule, as in the case of appointments held to be illusory or otherwise according to the opinion or caprice of the Judge, Sir William Grant sometimes endeavoured to make a principle where it was impossible to find one. The doctrine of illusory appointments constituted a head of equity which has been judiciously swept away by one of the late acts of Sir Edward Sugden; it furnished one of the very few instances in which Lord Eldon dissented from the opinion of Sir William Grant, the rule by which the latter attempted to limit or render intelligible the jurisdiction of the Court having been strongly opposed by the Chancellor. Another and a more memorable instance in which the opinions of Lord Eldon and Sir William Grant differed, occurred, as is well known, in the point involving the doctrine of equitable prescription, on which the great cause of *Cholmondley v. Clinton* ultimately turned; Sir William Grant's opinion having been over-ruled by his successor, Sir T. Plumer, and the judgment of the latter having been affirmed in the House of Lords. Other illustrations occur to us, but enough have been given to mark out the leading features of his mind.

## NOTICES TO CORRESPONDENTS.

A CORRESPONDENT who inquires about the D'Este estate is informed that all the documents relating to it, as also a full and able "Juridical Exercitation" on the subject by Sir J. Dillon have been recently published. They will be found in our List of New Publications.

We have received a variety of Documents relating to Tithes on the Continent, and shall probably make use of them in our next Number. At present it is understood that a Commission will very shortly be named to report on the property of the Church of England.

## LIST OF NEW PUBLICATIONS.

A Treatise on the Law of Executors and Administrators. By Edward Vaughan Williams, of Lincoln's Inn, Esq. Barrister at Law. In two volumes, royal 8vo. Price 2l. 10s. boards.

The Act for the Amendment of the Representation of the People in England and Wales, 2 William 4, c. 45, with Notes, together with Tables, exhibiting at one View, illustrated by an accompanying Digest, the Representation, Franchises, Mode of Registration, and Course of Proceedings at Elections under the new System. By William Carpenter Rowe, Esq. of the Inner Temple, Barrister at Law. In 12mo. Price 5s. boards, pp. 217.

The Case of the Children of his Royal Highness the Duke of Sussex elucidated, a Juridical Exercitation. By Sir John Dillon, Knt. & Bt. S. R. E. In 4to. Price 7s. boards, pp. 59.

Papers elucidating the Claims of Sir Augustus d'Este, K. C. H. In Royal 8vo. Price 4s. cloth boards, pp. 40.

The Law of Fire and Life Insurance and Annuities, with Practical Observations. Part I.—The Law of Fire Insurance. Part II.—The Law of Life Insurance. Part III.—The Law of Annuities. By Charles Ellis, of Lincoln's Inn, Esq. Barrister at Law. In 8vo. price 8s. boards, pp. 263.

An Examination into certain Errors and Anomalies in the Principles and Detail of the Registration Clauses of the Reform Act, with Suggestions for their Amendment. By J. D. Chambers, Esq. M.A. of the Inner Temple, Barrister at Law. Price 2s. sewed.

A Practical Treatise on the Law of Partnership, with an Appendix of Forms. By John Collyer, of Lincoln's Inn, Esq. Barrister at Law. In Royal 8vo. Price 1l. 8s. boards, pp. 818.



*Institutes of Natural Law*, being the Substance of a Course of Lectures on *Grotius de Jure Belli et Pacis*, read in St. John's College, Cambridge. By T. Rutherford, D.D. F.R.S. Second American Edition, carefully revised and corrected. In Royal 8vo. price 18s. boards, pp. 596.

A Proposal for the Erection of a General Record Office, Judges' Hall and Chambers, and other Buildings, on the site of the Rolls Estate, together with some Particulars respecting the Suitors' Fund. By C. P. Cooper, Esq. In 8vo. price 6s. cloth boards, pp. 118.

Parliamentary Reform Act, 2 Wm. 4, c. 45, with Notes, containing a complete Digest of Election Law, as altered by that Statute, and with Analytical Tables and a copious Index. By Francis Newman Rogers, Esq. of the Inner Temple, Barrister at Law. In 12mo. price 5s. 6d. boards, pp. 147.

Instructions for preparing Abstracts of Titles after the most Improved System of Eminent Conveyancers; to which is added a Collection of Precedents, showing the Method not only of abstracting every Species of Deeds, but also of so connecting them together by Collateral Documents as to form a complete Title. In 12mo. price 5s. boards, pp. 162.

A Historical Treatise on Trial by Jury, Wager of Law, and other Co-ordinate Forensic Institutions, formerly in Use in Scandinavia and Iceland. By Thorl. Gudm. Repp. In 8vo. price 7s. 6d. boards, pp. 192.

Reports of Cases in Bankruptcy, argued and determined in the Court of Review and on Appeal before the Lord Chancellor. By Edward E. Deacon, of the Inner Temple, Esq. Barrister at Law, and Edward Chitty, of Lincoln's Inn, Esq. Barrister at Law. Vol. I. Part I. Hilary Term and Sittings, 1832. Price 12s. sewed.

The Act 2 Wm. 4, c. 45, to amend the Representation of the People in England and Wales, with Notes and copious Index. By A. E. Cockburn, Esq. Barrister at Law. In 12mo. price 3s. 6d. boards, pp. 124.

The Law and Practice of Elections, (for England and Wales,) as altered by the Reform Act, &c. including the Practice on Election Petitions; also showing the Divisions of Counties and Boundaries of Boroughs: together with the Duties to be performed by Sheriffs, Returning Officers, Clerks of the Peace, Town Clerks, Revising Barristers, Overseers, &c. preparatory to the ensuing Elections, &c. The Whole forming a Body of Useful Information for Solicitors and Agents, who will necessarily be employed in arguing Votes, &c. before the Revising Barristers. With a Copious Appendix, containing all the Acts on Elections; with the Reform and the Division and Boundary Acts; new Forms to be used in Elections; List of Boroughs, their Population, Number of Voters, &c. &c. By Charles F. F. Wordsworth, Esq. of the Inner Temple. Price 1l. 1s.

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The Boundary Act, with Notes, Index, &c. By W. C. Rowe, Esq. Barrister at Law.

# THE LAW MAGAZINE.

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## ART. I.—CRIMINAL COURTS, CRIMINAL PROCEDURE, AND RECENT CHANGES IN THE CRIMINAL LAWS, OF FRANCE.

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1. *Code d'Instruction Criminelle.* Paris. De l'Imprimerie Royale. 1832.
2. *Code Pénal.* Paris. De l'Imprimerie Royale. 1832.

IN our first volume we gave a detailed account, illustrated by an appendix of forms, of the Civil Courts and Civil Procedure of France, and announced an intention of dealing in the same manner with the Criminal Courts and Criminal Procedure immediately. Rumours, however, having reached us that various important changes in the administration of criminal justice were meditated, we thought it better to wait till something definitive should be done or resolved upon, to which the troubled state of the country has, till very lately, presented an insuperable bar. It was not until the end of the last session of the Chambers that the long called for modifications of the Codes in question were ingrafted on them, and this, therefore, is the first opportunity presented us of redeeming our original pledge.<sup>1</sup>

<sup>1</sup> The law modifying the Code Penal and the Code of Criminal Instruction, was sanctioned the 28th of April, promulgated the 1st of May, executory the 1st of June, 1832. It is incorporated into the editions of the Codes named at the head of the Article. For the guidance of those who may wish to study the criminal laws of France, and also to save the trouble of repeated reference and acknowledgment, we shall here mention the publications which we have used. These are the editions of the Codes suivis des *Motifs exposés par les Conseillers d'Etat, et des Rapports faits par la Commission de Legislation du Corps Legislatif, sur chacune des lois qui composent*

The entire revisal, if not reform, of so important a part of a great people's legislation, offers a tempting field for speculation and debate, but the main object of the following pages will be to give a clear account of their courts and procedure in matters of crime, by way of basis for future comparison and commentary. A few historical allusions will be necessary to make the effect and spirit of some existing institutions intelligible; and, though not strictly within the province of this article, we shall annex a concise summary of the changes which the Code of Punishments has undergone.

The judicial organisation of France at the breaking out of the first revolution, was of the most complicated and irregular sort; being made up of many ill-defined jurisdictions, some of feudal, some of royal, and some of ecclesiastical, origin. Thus, there were the *Parlements*, supposed to be a branch or relict of the great council or general assembly of vassals which the king and the greater feudatories had been anciently accustomed to hold;<sup>1</sup> the courts called *bailliages* and *senechaussées*, so called from their being held before the *bailli* or *seneschal*

*les Codes*; Code Penal Progressif, ou Commentaire sur la Loi Modificative du Code Penal, &c. par M. Adolphe Chauveau, Avocat, &c. 1832; De la Justice Criminelle en France, d'après les lois permanentes, &c. par M. Bérenger, 1818; Observations Critiques sur la Procédure Criminelle, &c. par M. J. M. B. . . . (Berton, we believe,) Avocat, 1818; Observations sur Plusieurs points importants de notre Législation Criminelle, par M. Dupin, 1821; Des Lacunes et des Besoins de la Législation Française, &c. par M. Legraverend, 1824; Reflexions sur les Loix Penales de France et d'Angleterre, par A. H. Taillandier, 1824; De l'Instruction Criminelle, &c. par M. Carnot, 3 vols. 4to. 1830; Le Code d'Instruction Criminelle et Le Code Penal mis en harmonie avec la Charte, &c. (published anonymously, but understood to be by M. Carnot,) 1819; Des Pouvoirs et des Obligations des Juries, par Richard Phillips, traduit de l'Anglais, par M. Comte, 1827; Cours Elementaire des Codes Penal et de l'Instruction Criminelle, par M. Pigeau, 1817; Cour de Droit Criminel, &c. par M. Berriat Saint Prix, 1825; Esprit &c. des Institutions Judiciaires &c. par M. Meyer; Des Institutions Judiciaires &c. par M. Rey, de Grenoble, 1826; On the Administration of Criminal Justice in England, &c. by M. Cottu, translated from the French, 1822; De l'Administration de Justice &c. en France, par M. Eyraud, 3 vols. 1825; Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes &c. vol. iv. art. 19; Das Deutsche Strafverfahren in der Fortbildung &c. und in genauer Vergleichung mit dem Englischen und Franzosischen Straf-Prozesse, von Dr. C. J. A. Mittermaier, Geheimenrathe und Professor, Heidelberg, 1832.

<sup>1</sup> As our King's Bench is supposed to have emanated from the *Aula Regia*. See Meyer, tom. ii. Rey, tom. i. It seems that all the superior courts were not called *parlements*; some went by the name of *grande cour*, and that of Colmar was called *conseil souverain*.

of the king or the lord; the *prevots de la maréchaussée*, created by royal authority for the trial of assassins and armed robbers; the *présidiaux*, which were courts of inferior rank, established by the crown with the view of narrowing as much as possible the authority of the seigniories; and the *prevots royaux*, royal judges invested with exclusive or co-ordinate jurisdiction over certain specified cases. To these, which may be termed the *ordinary*, must be added the *spiritual* and the *extraordinary* courts (*tribunaux d'exception*) instituted to decide in cases relating to the revenues of the crown and direct and indirect taxes. It requires only a very slight acquaintance with the history of France to be aware that the royal authority had gradually encroached upon and reduced every other sort of authority to insignificance; but the rival jurisdictions still retained authority enough to prevent the system from becoming uniform and give rise to the most harassing uncertainties.

With regard to the procedure then in force, the main parts of it were based on rules formed as long ago as the first establishment of permanent tribunals, which, according to M. Rey of Grenoble, caused a whole host of inveterate abuses to spring up. Amongst others, it led the way to, if it did not cause, the total exclusion of publicity; wanting which, any given system will soon want every thing. Secret procedure appears to have been first introduced into France in the thirteenth century, to be employed in the persecution of a particular class of heretics, the Albigenses; but in many provinces it was perseveringly resisted and kept out until so low down as 1539, when a royal ordinance formally extended it over the whole kingdom.<sup>1</sup> Another addition, not less fatal in its consequences, made to French criminal jurisprudence about the same time, was the adoption of the principle that no person could be condemned without having confessed his crime, which, notwithstanding all its seeming humanity, soon brought after it the physical torture, now happily at an end, of the *question préparatoire*,<sup>1</sup> and the mental torture, which still endures, of the *interrogatory*.

<sup>1</sup> Meyer, tom. i. pp. 556--562.

<sup>2</sup> The *question préparatoire* was torture used to compel a confession when proof sufficient in the eyes of the court to justify the application, appeared against the

We select these two traits as the most distinctive of any, indeed perfectly decisive of the character of the procedure in question; and it is to be observed that they continued essentially unchanged, i. e. that secret trials and the use of torture were in force, till the whole system was struck down at a blow. In the intervening space, however, some well-meaning efforts were made to render the administration of both civil and criminal justice more pure. Such was the ordinance of 1457, which shortened delays, forbade imprisonments other than in the prison of the court, and directed the accused to be furnished with copies of the preliminary proceedings prior to his being interrogated. Such, again, was the more important ordinance of 1670, which formed the common law of France as regards criminal procedure at the beginning of the revolution, and has furnished a considerable quantity of materials to the code. This ordinance made all accusers, official accusers not excepted, liable in damages in case the accusation turned out to be false, admitted witnesses to be heard for the defence, and directed the witnesses for the prosecution to be confronted with the accused. It also contained some good regulations as to prisons, and restricted the application of torture to crimes punishable by death, and cases where the proof was considerable. Such crimes, however, were very numerous, and the latter part of the restriction was too vague to do good. On the other hand, it greatly aggravated the evil of the interrogatory, as it gave the power of interrogating upon oath. The only other amendment, prior to 1791, worth mentioning, is an ordinance of Louis XVI. abolishing the *question préparatoire*.

"The defects of the penal laws of France (says M. Meyer) had long made themselves felt to such a degree, that, independently of political changes, it is beyond a doubt that a legislation, wholly different from the established one, would have been introduced. The public opinion on this subject had been pronounced; the nobles as well as the people, the magistrates equally with individuals, the king himself, desired

accused; the *question préalable* was torture applied with the view of extorting the discovery of accomplices. "It may well make one shudder to think that such means of conviction formed the common law of France and a great part of Europe till near the end of the last century." Rey, tom. i. p. 246.

a reform; it was prepared by the ideas, more sound, more philanthropical, more liberal, with which the writings that marked the period immediately preceding had filled all minds. This change might have been effected with mildness and moderation."<sup>1</sup> Unfortunately; however, we all know that it was not. No attempt was made to adopt or modify existing establishments; but the whole judicial organization of France, "that scaffolding (as M. Rey calls it) of divers jurisdictions, sprung from the conflict of private interests and not from the wish to satisfy the wants of the mass of the people," was overthrown by the Constituent Assembly in a day.<sup>2</sup>

Not being able to afford space enough to detail the many plans of judicature adopted in its stead during the eighteen years that intervened between this sweeping sentence of condemnation and the promulgation of the criminal code, we shall merely mention two or three striking particulars, in which the provisional systems differed from that established by Napoleon and still, in all its main features, in force.

By the law just cited, the nomination of the judges was given to the people (*aux justiciables*); the only restriction being, that the choice should be made from amongst the old judges or the men of law. The same rage for every thing which savoured of democracy, rather, it is to be feared, than an enlightened estimate of the benefits of the institution, led to the temporary imitation of the English grand jury, under the name of the jury of accusation. Within twenty-four hours after the imprisonment of the accused, all documents relating to the charge were to be transmitted to an officer called the director of the jury, who, with another officer called the *commissaire du roi*, was to decide whether the case was one to be laid before the jury or not. If they decided in the affirmative, the jury was convoked, and the oath administered by the director in the presence of the commissary; and after hearing the complainant and the witnesses, the jury was left to deliberate alone. If they negatived the charge, the complaining party (if any) was still at liberty to prepare the indictment and submit the accusation to the jury himself, or the director of the jury might call for the opinion of the district court on its sufficiency. The common

<sup>1</sup> Tom. v. p. 441.

<sup>2</sup> Law of 24th Aug. 1790.

jury, also, was widely different at this period from what it subsequently became, and here undoubtedly the democratical principle did good; for each jury was formed by lot, after a reasonable number of challenges, from a list (200) too large to admit of tampering. The mode of declaring the verdict according to the law of Sept. 29th, 1791, is also worthy of remark. The jury retired into a separate chamber. The first inscribed was declared the chief. When they were agreed, one of the judges, the commissary and the chief of the jury passed into the council chamber of the court; where each jurymen came separately before them, and made known his opinion on each question by declaring it aloud and openly depositing a white ball in a white box, if he voted in favour of the accused, or a black ball in a black box, if his opinion was unfavourable. Ten votes out of twelve were requisite to condemn.

This liberal tendency of French criminal legislation did not last long, nor was it uninterrupted whilst it did last. During the stormy period of the revolution, the dominant faction almost always contrived to reach its intended victims despite of all legal securities. In 1793, for instance, the national convention, besides erecting the extraordinary criminal court called the revolutionary tribunal, decreed that the jury of accusation should consist of, and the common jury be chosen by, itself;<sup>1</sup> and from the moment the will of Napoleon had made itself felt, and he began to regard France as his patrimony, a complete change in the tendency of all legal institutions was wrought, and the strongest reaction in favour of arbitrary procedure is discernible.<sup>2</sup> The nomination of the

<sup>1</sup> See also the law of October 24, 1795, under which either jury might be packed.

<sup>2</sup> "Cependant la dictature impériale s'élevait; cimentée au-dehors par des conquêtes glorieuses pour la France; elle le fut au-dedans par des lois conformes à la nature et au principe du gouvernement despotique. Mais la transition subite de la liberté à la servitude est difficile et dangereuse.... Le vainqueur de Lodi, d'Arcole, de Marengo, s'était déclaré le soutien de la révolution. Il ne s'en montre pas l'ennemi à découvert. Il conserve les institutions libérales, en les infectant du germe des abus les plus monstrueux. Ce n'est plus le même homme qui, sans autre autorité que celle de la raison, éclairait, dans son conseil, la discussion de ce Code, fruit de quinze années de méditations des hommes d'état et des jurisconsultes les plus célèbres; ce n'est plus le même homme, qui dicte ou inspire à Treillard les deux Codes criminels de 1808 et de 1810, qui conserve l'institution du Jury dans un esprit contraire au but de cette institution même, multiplie les délateurs, les mises

judges and all other officers of justice, was vested in the executive government; whilst the judges were rendered virtually, and the officers of the *ministère public* avowedly, removable at will.<sup>1</sup> About the same time, a law was passed that no agent of government should be prosecuted without the authority of the council of state; incroachments fatal to liberty, were daily made by the administrative on the judicial authority; and martial law was widely extended by the creation of military courts. But it were useless to multiply examples, as the spirit by which the emperor and his organs were actuated sufficiently appears from the code of procedure itself; of which, in giving our promised sketch, we shall presently analyse the principal parts. But to make the judicial organization established or confirmed by it intelligible, we must still preface a remark.

Under, perhaps, all the systems which the merely English reader is acquainted with, the competency of the tribunal depends exclusively on the nature of the charge. If, for instance, a person were accused of theft, no preliminary inquiry would be necessary to decide by what court he should be tried. This is not the case in France. The court depends upon the penalty or punishment (*peine*), which in case of conviction would follow the crime, as whether it would be infamous or not; and as the punishment may depend in turn on the nature of the attendant circumstances, as whether they be aggravating or extenuating, it is obvious that the whole evidence must, in very many cases, be submitted to the judge before the question of jurisdiction can be solved. Such observations as we may have to offer on the advantages and disadvantages of this plan, will be better understood hereafter. We mention it here to draw the reader's particular attention to the definitions of crimes mixed up with our sketch, which must be firmly fixed in the memory, or much that follows will appear unmeaning and confused. Codes of procedure and codes penal may

au secret, les detentions indéfiniment prolongées, et applique une procédure despotique sur tant le points où elle commande ou permet l'arbitraire à un code pénal trop cruel, si les jurés n'étaient souvent plus humains et les magistrats plus sages que la loi."—*Observations Critiques sur la Procédure Criminelle, par M. Berton, p. 3.*

<sup>1</sup> The constitution of November 8, 1790, creating the consular government, contained provisions to this effect.



frequently be considered apart, but, in systems based on such a principle as the above, they are inseparable.<sup>1</sup>

In France, then, as already intimated, the punishable infractions of law, and the tribunals appointed to adjudicate on them, are classed according to the punishment. Thus, there are three kinds of punishment, three kinds of infraction, three orders of jurisdiction.

I. *Punishments*. 1. The punishments both *afflictive and infamous* are death, *travaux forcés*, transportation, detention in a fortress, confinement in a *maison de force*. The punishments, simply *infamous*, are banishment and civic degradation.<sup>2</sup> 2. The *Correctional* punishments are imprisonment in a house of correction, temporary interdiction of certain civic rights,<sup>3</sup> and fine. 3. The punishments termed of *simple police* are imprisonment not exceeding five days, and fine not exceeding fifteen francs.

II. *Infractions*. 1. The infractions punishable by afflictive or infamous punishments are called *crimes*. 2. The infractions punishable by correctional punishments are called *delits*. 3. The infractions punishable by punishments of simple police are called *contraventions*.

III. *Jurisdictions*. 1. Crimes are judged by the *Cours d'Assises*. 2. Delits by the *Tribunaux de Police Correctionnelle*. 3. Contraventions by the *Tribunaux de Simple Police*.<sup>4</sup> Before proceeding to describe these courts, we must take a glance at the general scheme of judicature of which they are a part.

France, as regards the administration of criminal law, is divided into departments, arrondissements, cantons, and communes; with a *maire* for each commune, a *juge de paix* for each canton, a *tribunal de première instance* for each arron-

<sup>1</sup> An ingenious speculation as to the views which led to the adoption of this principle, may be seen in Meyer, tome 5, pp. 441, 449. The principle has also been partially adopted in Germany; for instance, in the Penal Codes (*Strafgesetzbücher*) of Bavaria and Oldenburgh.

<sup>2</sup> Which consists in the deprivation of all civic and political rights, as voting at elections, serving on juries, &c. See Code Penal, Art. 34.

<sup>3</sup> They are enumerated in the Code Penal, Art. 42.

<sup>4</sup> This order has been departed from as regards *delits* committed by the press, and certain *delits* of a political character, which, by the charter of 1830 and the law of October 8th, 1830, are transferred to the *Cours d'Assises*, where they are tried by a jury.

dissement, and a *Cour d'Assises* for each department. Next above these come the *Cours Royales*, which are exclusively courts of appeal without original jurisdiction of any sort. There being eighty-seven departments and only twenty-seven *Cours Royales* in the whole, each *Cour Royale* necessarily includes several departments, the number varying according to population and wealth.<sup>1</sup> Supreme above all, the Court of Cassation comes last, which is strictly what its name imports, and has no original jurisdiction. All these courts (excepting the *Mairies* and the *Cours d'Assises*,) exercise both criminal and civil jurisdiction; and in some instances, as will presently appear, the name of the court changes with the capacity in which it happens to be acting for the time. We shall now be able to explain satisfactorily the three orders of jurisdiction recapitulated above.

1. *Cour d'Assises*. This court is composed of three members,<sup>2</sup> one of whom acts as president. If the department be the seat of a *Cour Royale*, they are chosen from amongst the judges by the first president of that court. In the other departments, the Assise Court consists of a judge of the *Cour Royale*, who presides, and of two other judges, taken either from amongst the judges of the *Cour Royale*, if that court shall think proper to delegate them, or from amongst the judges of the *Tribunal de Première Instance* of the department in which the assizes are held. The assizes are to be held every three months, or oftener if need be, in the principal place of the department, and two or more Assise Courts may be formed in a department, if required. At Paris this is constantly done. The minister of justice (*Garde des Sceaux*) may name the members of the Assise Court, if he think proper; indeed, according to the letter of the law, it is only on his omitting to nominate, that the nomination devolves on the president of the *Cour Royale*; but the prerogative is seldom resorted to, and its obvious liability to abuse affords a strong argument for its abolition. In one well known case,

<sup>1</sup> This description of court was first established by the law of 17th March, 1800. By the law of 24th August 1790, the district courts were reciprocally courts of appeal to each other.

<sup>2</sup> The Jurist (No. 8, p. 210) says five; which was the number established by the Code. The alteration was made by the law of March 4th, 1831.

that of General Berton, Peyronnet, then minister of justice, availed himself of the privilege, with the palpable object of packing the court. The Assize Court cannot try without the intervention of a jury, except in the case where the accused is absent, and makes default. It is the only court in which jury trial prevails.

2. *Tribunaux de Police Correctionnelle.* All the tribunals of first instance form themselves periodically into tribunals of correctional police. They may sit, we believe, in both capacities on the same day, but an intermediate adjournment is necessary. In tribunals consisting of several chambers, one of the chambers is specially charged with the duty. In Paris, for example, there are two chambers of correctional police, of which all the judges are members by turns. Besides its original jurisdiction, the tribunal of correctional police exercises an appellant jurisdiction over the tribunals of simple police.

3. *Tribunaux de Simple Police.* The *juges de paix* constitute themselves tribunals of simple police, to judge *contraventions* committed within their respective cantons. In a commune, however, not being the principal place of the canton, the mayor may judge *contraventions* committed in it by persons taken in flagrant delict,<sup>1</sup> or by persons resident or present in the commune, when the witnesses are resident or present in it and when the complainant only demands damages not exceeding fifteen francs.

Before tracing the course of proceeding in these courts, it is necessary to call attention to a striking point of difference between the French system and our own. In England there is no public prosecutor, bound *ex officio* to take notice of ordinary infractions of law; and if the offence amounts to a felony, the private right of action for damages is lost.<sup>2</sup> In

<sup>1</sup> As this phrase is constantly recurring, we subjoin the definition of it; premising that *delict* here means any infraction of law, and not simply an offence cognizable by the correctional police: "The delict, which is in the act of commission, or which has just been committed, is a flagrant delict. Those cases shall also be reputed cases of flagrant delict, where the accused is pursued by the public clamour, and where the accused is found in possession of effects, arms, instruments, or papers, raising a presumption that he is author or accomplice, provided this be soon after the delict.—*Code de Instr. Cr. Art. 41.*"

<sup>2</sup> In German procedure, also, the *Ministère Public* is unknown: "Der Deutsche

France, on the contrary, every punishable infraction of law becomes the subject matter of two actions : the public or criminal action, which the public officer is not simply bound, but exclusively entitled, to prosecute; and the private or civil action, which may be brought by any person or persons for damages.<sup>1</sup> The distinction is so important, and is liable to be so frequently discussed, that we are tempted to extract the formal justification of it from the report of the Committee of Legislation :

“ The law about to be submitted for your sanction has for object the first division of criminal instruction, that which concerns the prosecution of offences. I should not stop at the preliminary dispositions, which only comprise principles little contested, did not one of these principles deserve, by its importance, to occupy your attention for a moment : it is that which establishes the public action against all offences without distinction, and renders it independent of all private interests and transactions. The precise contrary was the case amongst the ancients. The prosecution of all offences was abandoned to animosity and private vengeance. The first act of justice, which ought always to be exempt from passion, was exercised by the expression of resentment. The great éclat that eloquence has shed on public accusations has not been able to conceal their dangerous influence from posterity ; and

Prozess kennt kein Institut der Staatsbehörde.” *Strafverfahren &c. von Dr. Mittermaier.* 1 vol. p. 234.—It is known in Italy : *Dolce, Origine et attributioni del Pubblico Ministerio nel regno d' Italia.* Brescia, 1813.

<sup>1</sup> The five first articles of the Code de Procedure Criminelle, relate to these actions, and are as follows :

Art. 1er. L'action pour l'application des peines, n'appartient qu'aux fonctionnaires auxquels elle est confiée par la loi. L'action en réparation du dommage causé par un crime, par un délit ou par un contravention peut être exercée par tous ceux qui ont souffert de ce dommage.

2. L'action publique pour l'application de la peine s'éteint par la mort du prévenu.

L'action civile pour la réparation du dommage peut être exercée contre le prévenu et contre ses représentans.

L'une et l'autre action s'éteignent par la prescription, ainsi qu'il est réglé au livre 2, titre 7, chapitre 5, *De la prescription.*

3. L'action civile peut être poursuivie en même temps et devant les mêmes juges que l'action publique.

Elle peut aussi l'être séparément : dans ce cas, l'exercice en est suspendu tant qu'il n'a pas été prononcé définitivement sur l'action publique intentée avant ou pendant la poursuite de l'action civile.

4. La renonciation à l'action civile ne peut arrêter ni suspendre l'exercice de l'action publique.

their fatal effects introduced private vengeance into justice itself, whose object was to prevent it.

"Our modern laws have placed the prosecution of offences in the hands of the magistracy, and the accusation has taken the character for impartiality of the law of which they were the organs. But if the successive advances of our criminal laws be considered, it will be seen how many efforts have been obliged to be made by the legislator to arrive at the principle of the new code. The ancient criminal ordinances had not even ventured to establish the principle without exception, and private transactions could, in certain cases, stop the proceedings of the public prosecutor. Such was the influence which the fatal principle of private vengeance had preserved! so many obstacles is it necessary to conquer to struggle against human passions!

"It was, notwithstanding, in the very middle of the struggle of passion and of all the vain sophisms which appealed to the public accusation of the ancients, that this important principle was proclaimed without exception. It is to be found in our intermediate codes of 1791 and of *Brumaire*; but the law now proposed to you was alone able to make of this principle a fundamental base (*base fondamentale*) of our criminal justice."<sup>1</sup>

The body of officers thus charged with the exclusive duty of prosecuting is termed the *ministère public*, and is organized in the following manner:

In the Cours Royales, the *ministère public* consists of a Procureur General, who acts as the chief, and of *avocats généraux* and *substituts*, who act under him; in the tribunals of first instance, of a *Procureur du Roi*, placed under the orders of the Procureur General of the Cour Royale, and assisted by one or more substitutes.<sup>2</sup> The *Procureur General*, or an *avocat general*, or a *substitut*, is charged with the duties of the *ministère public* in the Cour d'Assises held at the seat of the Cour Royale, and in the chamber of the Cour Royale which judges appeals of correctional police. In the Assize Court of the departments where there is no Cour Royale, the *Procureur du Roi* of the place ordinarily discharges them. The Procureur General, however, may act in person, or even send an advocate general or one of the substitutes of the Cour Royale.

<sup>1</sup> Rapport sur le Livre 1<sup>er</sup> du Code d'Instruction Criminelle par M. Dhaubersart, President de la Commission de Legislation. Seance du 17 Nov. 1808.

<sup>2</sup> At Paris, for instance, there are fifteen such substitutes.

In the tribunals of correctional police, the *ministère public* is filled by the Procureur du Roi or one of his substitutes; in the tribunals of simple police, by an inferior officer called a commissary of police. If there be no commissary of police in the district, by the mayor, or, in his default, by his *adjoint*. When the mayor is the judge, by the *adjoint* or a member of the municipal council.

Whenever, and by whatever means, an officer of the *ministère public* becomes cognizant of a crime, a delict, or a contravention, it is his duty to bring the offender to justice. There are some few cases, however, in which a complaint on the part of the injured party is required to justify the prosecution.<sup>1</sup> We shall close this account with two short extracts, from which the relative importance of the offices we have been enumerating may be learnt, and some notion be formed of the attributes which have made them an object of jealousy:

“It is in the hands of the *procureur imperial*<sup>2</sup> that all the information collected by the other agents of the judicial police will unite. It is this magistrate who is particularly charged with the investigation and pursuit of all crimes and delicts; the other officers of the police are but his auxiliaries.”

Again: “It is he who is specially charged with the investigation and pursuits of all crimes and delicts, and who ought, as soon as they come to his knowledge, to inform the procureur general of them; for he is, if the expression be allowable, the eye of the procureur general, as the procureur general is the eye of the government. It is by the result of an active and faithful communication from the procureur imperial to the procureur general, and from the procureur general to the minister of his majesty, that the abuses which glide into institutions are known, the indolence which takes possession of persons, the indifference which may be forgiven

<sup>1</sup> The principal are: Sporting without leave, crimes committed in a foreign country by a Frenchman against a Frenchman, and adultery, which is criminally punishable in France; the woman being liable to an imprisonment of not less than three months and not more than two years, and the man to the same period of imprisonment and a fine of from 100 to 2,000 francs. The only proofs that can be admitted against the man, if the case be not one of flagrant delict, are letters or other documents written by himself. The husband may remit the wife's sentence by taking her back.

<sup>2</sup> The *Procureur du Roi* was so called under the Empire, and the *Cours Royales* were called *Cours Imperiales*.

in a private individual, but which is a vice in the magistrate. And were we to suppose remissness, feebleness, or concealment in the communications of the procureurs, general and imperial, the evil would have made immense progress without breaking out; and without any crisis having taken place, all would suddenly be found in a state of languor bordering on decrepitude."<sup>1</sup>

The minister of justice is the minister above alluded to, with whom it is the duty of the procureur general to communicate. As the prefects are kept in a similar state of subordination to the minister of the interior, and there are no municipal privileges of any importance in France, the apprehension entertained of the undue influence of the executive government on the administration of justice, can hardly be deemed an unreasonable one.<sup>2</sup>

We shall now trace the course of proceeding laid down for each of the abovementioned three orders of courts.

All constituted authorities who, in the exercise of their functions, shall have become cognizant of a crime or delict, and all persons who shall have been witnesses of an attempt either against the public safety or the life or property of an individual, are bound to apprise *the procureur du roi* of the district of such crime, delict, or attempt immediately, who is bound in turn to require the *juge d'instruction* (to be presently described) to order the matter to be investigated. In the case of flagrant delict, however, or where a crime or delict, not flagrant, is committed in the interior of a house, and the master (*chef*) requires the immediate verification of it, the procureur or other officer of the ministère public or police, within whose jurisdiction the offence is committed, is bound to repair without delay to the place, investigate all the circumstances, interrogate the accused, receive the declarations of all persons capable of giving information concerning it, and seize arms or any thing else that appears to have been used in

<sup>1</sup> Motifs par MM. Treilhard, Réal, et Faure.

<sup>2</sup> Not content with this concentration of executive power, and the virtual dependence of the bench, Napoleon established special courts, each to be composed of five magistrates and three military men, for the trial of particular offences, rebellion included. These were abolished by the *Charte Constitutionnelle*. A separate title is devoted to them in the *Code d'Instruction Criminelle*, which has thus become nearly nugatory.

the commission or may assist in the discovery of the crime. In the case of flagrant delict, and when the act shall be of a nature to draw after it an afflictive or infamous punishment, the officer may apprehend the accused against whom strong proofs shall appear, if present, or, if not present, may issue a warrant for his apprehension.<sup>1</sup> In such cases the *procureur du roi* or other officer draws up a written statement (called a *procès verbal*) of the charge and the steps taken with relation to it, which is forthwith forwarded to the *juge d'instruction*.

The *juge d'instruction* is chosen by the crown from amongst the judges of the tribunal of first instance, ordinarily for three years, but he may be continued longer. There must be one at least in each *arrondissement*; and at Paris the Code enjoins that there shall be six. In the case of flagrant delict, this judge has power to act like the *procureur du roi* or officer of the police in a similar case; but his ordinary duties are limited to collecting proofs and issuing the necessary warrants against the accused. For this purpose he has power to compel the attendance of witnesses,<sup>2</sup> as also to search for and seize papers and other effects which may be useful in the discovery of the truth, not merely in the domicile of the accused but in other places in which he may presume them to be hid. If such papers and effects be out of his *arrondissement*, he may call on the *juge d'instruction* of the *arrondissement* in which they are supposed to be, to take such steps as may be necessary. The task of examining an absent witness may also be delegated.<sup>3</sup>

<sup>1</sup> On referring back to the definition of flagrant delict, it will be seen that the majority of ordinary offences are included in it. A common robbery, for instance, would generally come within it. In all such cases, therefore, a common police officer would be entitled to exercise the functions of a magistrate. This is one of the defects commented upon, in strong but well founded terms of reprehension, by M. Cottu.

<sup>2</sup> The practice of binding over witnesses to appear at the trial is unknown in France; but the witness is punishable, if he does not obey the citation or summons.

<sup>3</sup> "L'instruction consiste dans l'action de recueillir tous les genres de preuves possibles, tels que les dépositions de témoins, des examens d'effets, papiers, et domiciles; des interrogatoires des inculpés ou prévenus; des commissions à d'autres magistrats pour ces opérations," &c. Cour de Droit Criminel, par M. Berriat St. Prix, p. 103.



There are four sorts of warrants which the judge of instruction is authorised to issue:—

*Mandat de Comparution*, which simply requires the alleged offender to appear. The judge of instruction has the option of issuing it when the accused is domiciled and the offence can only be followed by a correctional punishment.

*Mandat d'Amener*, or warrant of arrest, which the judge of instruction is bound to issue in all cases where the alleged offence imports an afflictive or infamous punishment.

*Mandat de Depot*, or warrant ordering the provisory detention of the accused, originally intended for two cases only: where the accused is arrested out of the *arrondissement* of the judge of instruction who has issued the *mandat d'amener*, and where, being seised in flagrant delict, the judge of instruction commits him to prison provisionally.<sup>1</sup>

*Mandat d'Arret*, or plain warrant of imprisonment. It must specify the act for which it is issued, and cite the law declaring such act a crime or delict. This is not necessary in the other *mandats*, which has led to the abuse of substituting the *mandat de depot* for the *mandat d'arret*.

When the judge of instruction has issued a *mandat de comparution*, he is bound to interrogate the accused immediately; when a *mandat d'amener*, within twenty hours at the latest. If the accused refuses to answer, the judge, it seems, may imprison him till he does.<sup>2</sup> After hearing the accused and the *procureur du roi*, if the act imports an afflictive or infamous punishment, the judge may issue a *mandat d'arret*. He has no power to grant the *liberté provisoire*, in other words, to take bail. This privilege is confined to the court of inquiry to which the matter is next to be referred.

The judge of instruction is bound to render an account, once a week at least, of the matters the instruction of which

<sup>1</sup> This is M. Rey's account. The cases to which these *mandats* apply are but imperfectly laid down in the code.

<sup>2</sup> No such power is given in terms by the code, but the proofs of its exercise are clear. It is thus described by M. Berton:—"If the first interrogatory has been ineffectual, it is renewed at the end of a week, and the only question put to the accused is—Do you persist in denying or in being silent? It shall take place in the house of confinement, where the accused shall be enrolled by virtue of a *mandat de depot*, drawn up by the magistrate. In this interval the accused will be treated like the other prisoners; only he is not to communicate with any one on any pretence whatever." Other proofs will be given hereafter.

has devolved upon him.<sup>2</sup> The account is rendered to the *chambre du conseil*, formed out of the court of first instance, and consisting of three judges at least, including the judge of instruction. Before making his report in any given affair, the judge of instruction communicates the proofs to the procureur du roi, who takes his conclusions, that is to say, calls for what in his opinion should be done. The report is made, and the chamber deliberates in secret conclave. If the chamber be of opinion that there is sufficient presumptive proof of a crime, the case is remitted to the Cour Royale; if of a delict, to the tribunal of correctional police; if of a contravention, to the tribunal of simple police; if of neither one nor the other, the sentence is that there is no ground for prosecution, and the accused, if under confinement, is released. To justify such a sentence, however, the chamber must be unanimous, for if one of the judges be of opinion that the act is of a nature to call for an afflictive or infamous punishment, and sufficiently supported by proof, the case must be proceeded with. The procureur du roi and the party in the civil action have also each of them the power of appealing against and delaying the release of the prisoner. In a word, unless all the members of the chamber of council, the procureur du roi, and the civil party, agree that the accusation is groundless, the affair must be referred to another preliminary examination in the Cour Royale, and the documents are forthwith forwarded to the procureur-general of that court.

The proceedings hitherto described are common to crimes, delicts and contraventions, though, as respects the two last, not all necessarily, as will presently appear, resorted to. We are now arrived at the point at which the threefold division presents itself again. The chamber having decided that there is presumptive proof of an offence, and fixed the nature of it, the matter is formally transferred to a Cour Royale to be tried at the assises, to a tribunal of correctional police, or to a tribunal of simple police. We shall take each of these alternatives in turn.

<sup>2</sup> Here, again, the practice is widely different from what the letter of the law would lead one to suppose. One of the most crying evils is the length of time (seemingly unlimited) during which an accused person may be detained whilst the judge of instruction is collecting evidence. Of this also anon.

Within ten days after the reception of the documents, transmitted as before-mentioned after the chamber of council has decided on them, the procureur-general is bound to make his report. A section of the Cour Royale, formed for this purpose, is bound to assemble at least once a week in the council chamber, to hear the report of the procureur-general and decide on his requisitions. The decision of this section must be pronounced within three days after hearing the report. The members deliberate privately, after all the documents have been read to them aloud in the presence of the procureur-general, who thereupon retires. Neither the accused, the civil party, nor the witnesses appear. Additional instruction may be ordered, if deemed necessary. If they are of opinion that no offence has been committed, or that the proofs are insufficient to raise a presumption of guilt against the prisoner, he is discharged. If, on the other hand, the charge be sufficiently made out to justify what is termed *la mise en accusation*,<sup>1</sup> an *arret* is made referring it to the Cour d'Assises, and the procureur-general is bound to prepare the *acte d'accusation*, in which the nature of the crime, the act with all the circumstances capable of aggravating or extenuating the punishment, and the description of the accused, are to be contained.

Prior to the promulgation of the code, this preliminary inquiry, now devolved on certain members of the judicial order, was entrusted to a jury of accusation, in imitation of the grand jury amongst us. But there was little similarity, and the experiment met with very indifferent success. Instead of forming the most respectable inhabitants in a considerable extent of country into a jury at proper intervals, juries of eight were formed once, or even twice, a month in districts of which three or four went to make a department; the jurors being taken from the common jury list, which was made out by the agents of the government. A judge presided, and only

<sup>1</sup> Prior to the decision of the section of the Cour Royal against the accused, he is termed *prevenu*; from that time forth he takes the name of *accusé*. A good deal of embarrassment may be avoided by keeping this distinction in mind. There are three other technical terms which are constantly leading foreigners astray—*arret*, *jugement*, and *sentence*. *Arret* means a decision of a Cour Royale or the Court of Cassation; *jugement*, a decision of a tribunal of first instance; and *sentence*, a decision of a *juge de paix*.

the complaint and the written declarations of the witnesses were shown to them.<sup>1</sup> Under these disadvantages, the institution answered so ill that Napoleon ran little risk of exciting discontent by abolishing it. The objections urged against it in the reports of the Committee of Legislation were, that the jurymen brought with them a host of local prejudices which prevented their deciding impartially, and were never able to understand the real nature of the duty expected from them. "It is vain for the directing magistrate to explain to them that they have not to decide whether the accused be guilty or not; it is rare that they do not erect themselves into judges. According to the greater number, to say *yes*, is to condemn; to say *no*, is to acquit." Another orator remarked:

"The jury of judgment (common jury) manifests what it feels strongly, after a perfect knowledge of the fact; the jury of accusation, on the contrary, has to reason on what it knows but from a presumption as to what is unknown: this calculation astounds men not used to it, and in this embarrassment, the balance between the accuser and the accused is not always held with a firm hand. It is necessary, therefore, by placing elsewhere the right of declaring if there is ground for accusation or not, to protect alike the interest of society and the individual interest of the accused.

"You may well conceive, gentlemen, that so important a question has merited the attention of his majesty; and it is already the strongest of prejudices for the manner in which it has been resolved."<sup>2</sup>

The plain truth was, that his majesty feared to leave so strong a safeguard of liberty in the hands of the people as the institution properly purified would have formed, and therefore preferred destroying to improving it.<sup>3</sup>

<sup>1</sup> Law of 7th Pluviose, year 9.

<sup>2</sup> *Motifs*, &c. liv. 1. chap. 1. par Treilhard, Real et Faure. M. Dhaubersart, in reporting on the third book, beats them hollow in this sort of flattery. Speaking of the difficulties of criminal legislation, he remarks: "To sum up all in a word, the extraordinary genius whose regards penetrate beyond all obstacles, has hesitated more than once in the midst of the difficulties presented by our criminal laws."

<sup>3</sup> "Une nation peut avoir des magistrats intègres sans être libre. Pour qu'elle le soit, il faut que le pouvoir législatif et le pouvoir judiciaire participent au gouvernement. Le pouvoir judiciaire est dans le jury, de même que le pouvoir législatif est dans une chambre élective." (Speech of M. Royer-Collard, chamber of Deputies, séance du 17 Dec. 1807.) M. Carnot, a very high authority, gives his

The *arret* and the act of accusation are to be signified to the accused, and copies left with him. Within twenty-four hours after such signification he is to be transferred from the house of confinement to the house of justice attached to the court where he is to be tried, and within twenty-four hours of his arrival there and the transmittal of the documents connected with the charge to the registrar, he is interrogated by the president of the Assize Court or by the judge the president may delegate. The accused is required to declare the choice he has made of a counsel to aid him in his defence; otherwise the judge is bound to appoint him one, or all subsequent proceedings would be null. The counsel must be taken from amongst the advocates or *avoués* of the Cour Royale or its jurisdiction, unless the president authorises the selection of a relation or friend.<sup>1</sup> The prisoner is not allowed to communicate with his counsel until after the interrogatory. A copy of the *procès verbaux*, and the written declarations of the witnesses, with a list of the jury, are delivered to him. The accused is also bound to notify to the procureur general the names and descriptions of the witnesses for the defence.

The manner of forming the jury has varied considerably since the first promulgation of the code. The persons competent to serve as jurymen are the members of the electoral colleges, unpaid public functionaries appointed by the king, retired officers domiciled for five years and in the receipt of a pension of 1200 francs, doctors and licentiates of the learned faculties, members and correspondents of the Institute, and members of other learned societies recognised by the crown. The functions of a jurymen are declared incompatible with those of minister, prefect, sub-prefect, judge, procureur general and procureur du roi with their substitutes, counsellor of state, and royal commissary attached to an administration. Persons under thirty or above seventy are disqualified. In France, the privilege of serving on juries is esteemed a very valuable one. A register of all persons qualified is kept by the

opinion for the re-establishment of a jury of accusation. *Les Codes mis en Harmonie*, &c. chap. 12.

<sup>1</sup> The principal defender of the St. Simonians, in the recent absurd prosecution of that sect, was an unprofessional man.

prefect. This undergoes a regular revisal every year, and any person omitted may try the question by appeal to the Cour Royale. If there be less than 150 electors inscribed, the number is to be made up by citizens paying less than 200 francs in direct taxation, which is the qualification for an elector. According to the original text of the code, the prefect formed a list of sixty, which was subsequently reduced to thirty-six by the president of the court. At present, the prefect is bound to send in a list containing a quarter of all the names inscribed, provided it does not exceed 300; except in the department of the Seine, where it must contain 1500. Ten days before the opening of the assizes, the first president of the Cour Royale draws by lot, out of the list sent by the prefect, thirty-six names, which form the jury for the whole session. He also draws four supplementary names, to supply any accidental default. On the day of trial, the names are drawn by lot, until twelve unchallenged names have been drawn. The accused or his counsel, and the procureur general, may challenge such jurors as they think proper, as the names are drawn from the urn. The challenges must stop when only twelve jurymen are left; and each party is entitled to an equal number. The grounds of challenge are not allowed to be stated.

After the jury have taken their places, the president demands his name, age, profession, residence, and birth-place of the prisoner, and enjoins the counsel to say nothing against his conscience and to conduct himself with decency. He then repeats to the jury the terms of the oath to be taken by them, and each, being individually called upon, replies, raising the right hand, *Je le jure*. He next, after calling on the prisoner to be attentive, causes the judgment of the section of the Cour Royale and the act of accusation to be read aloud by the registrar, after which the president repeats to the accused the purport of the act of accusation, and says to him: "You see of what you are accused; you are about to hear the charges which will be produced against you." The procureur general then exposes the subject of the accusation, and presents the list of all the witnesses to be heard, whether at his own requisition, at that of the civil party, or at that of the accused. The list is read aloud by the registrar. It can

only contain the names which have been already notified.<sup>1</sup> The witnesses are ordered to retire into the chamber destined for them, and may be prevented from conferring together if thought necessary. They are called one after the other in the order fixed by the procureur general. The president administers the oath, and demands of them their name, age, profession, and domicile, whether they were acquainted with the accused prior to the commission of the alleged offence, and whether they are related (and in what degree) or attached to the service of the accused or the civil party. The witness then tells what he knows of the affair. The code forbids him to be interrupted. The president is bound to have noted down by the registrar any discrepancies that may appear between the deposition and the former declarations of the witness. After each deposition, the president demands of the accused if he wishes to reply to what has just been said against him; and the accused or his counsel may question the witness through the president, and state, against the witness and his testimony, every thing which may be useful to the defence. The president may demand equally of the witness and the accused all the explanations that he may believe necessary to the manifestation of the truth. The other judges, the procureur general, and the jurymen have the same right, after first requesting leave to speak of the president. The civil party, like the accused, can only put questions through the president. After the witnesses of the procureur general and the civil party have been heard, the witnesses for the defence are produced. All relations in the direct line of ascent or descent, brothers and sisters, connections by marriage in the same degrees, husband and wife even after divorce, and all public informers entitled to a pecuniary reward, are inadmissible, unless the procureur, the civil party, and the accused waive the objection. The accused or the public prosecutor may require the witnesses to retire after giving their evidence, and may also cause them to be recalled and re-examined in the presence of one another or separately, with the assent of the president. The president before, during or after the hearing of a witness, may cause one or

<sup>1</sup> The President may admit other witnesses; a power which *M. Merlin*, in the discussion of the late law, proposed to deprive him of.

more of the accused to retire, and examine them separately as to certain circumstances of the process. In the course of or after the depositions, the president shall cause to be exhibited to the accused all the documents or matters (*pièces*) relating to the offence, and require him to say if he recognizes them. They are also to be exhibited to the witnesses, if occasion requires. At the conclusion of the depositions and the incidental proceedings to which they may have given rise, the civil party or his counsel and the procureur general are heard in support of the charge. The accused and his counsel may reply to them. A reply is allowed to the civil party and the procureur general; but the accused or his counsel is to have the last word. The president then declares that the debates are terminated and sums up. He comments on the proofs, reminds the jury of their duties, and states the questions to be answered by them.

The question resulting from the act of accusation is, whether the accused be guilty of the crime with all the circumstances mentioned in the concluding summary of the act of accusation. If one or more aggravating circumstances, not mentioned in the act, result from the discussion, the president adds a question to the effect whether the accused has committed the crime with such or such circumstances.<sup>1</sup> When the accused shall have alleged as an excuse a fact admitted as such by the law, the president is bound to put the question: "Is such a fact clear?" If the accused be under sixteen, the following question must also be put: "Has the accused acted with discretion?" Lastly, it is the president's duty in all cases to apprise the jury, that if they are of opinion, by a majority of more than seven voices, that there are attenuating circumstances, they are to make a declaration to that effect.<sup>2</sup> All these questions are then delivered in writing to the jury by the hands of their chief, together with the act of accusation, the *procès verbaux*, specifying the crime, and the other documents, except the

<sup>1</sup> Art. 338. This article has been singularly extended in practice, it having been held that the president is authorised to present to the jury all the points *collateral* to those of the act of accusation. Thus, if the act of accusation (the indictment) charge a robbery, and the proof merely establish the fact of the prisoner's being an accessory by concealing the articles stolen, the president might leave it to the jury, as a collateral and additional question, to say, whether the prisoner be guilty as an accessory.

<sup>2</sup> This is one of the most important provisions of the new law.



declarations of the witnesses. The accused is withdrawn from the auditory, and the jury retire to deliberate. They cannot decide, like an English jury, without leaving the box. Before beginning to deliberate, the chief reads a paper, in which their duty is pointed out and they are required to confine themselves within their proper province of applying, without assuming to judge of the consequences of, the law. They are shut up till the declaration is formed. It consists of written answers to each of the questions submitted to them. The decision must be by a majority of more than seven, but the precise number is not allowed to be expressed. The jury return to their places when their decision has been framed, and the foreman reads the verdict aloud. He then signs and delivers it to the president. It is also signed by the president and registrar. A verdict of acquittal is final; but if the judges be unanimously of opinion that a verdict of guilty is fundamentally wrong, they may order a new trial.<sup>1</sup> The court, however, must order it of their own free motion, and immediately after the verdict has been pronounced. No one has a right to apply for it. If the accused be declared guilty, the procureur-general demands the application of the law, and the civil party restitution and damages. The president demands of the accused, if he has any thing to say in his defence. Neither the accused nor his counsel can urge any thing in denial of the fact, but only that it is not forbidden, or qualified delict by the law, or that it does not deserve the punishment demanded by the public prosecutor, or that the civil party is not entitled to the damages claimed.<sup>2</sup> The judges deliberate

<sup>1</sup> The following article was abrogated by the law of March 4th, 1831; "Si néanmoins l'accusé n'est déclaré coupable du fait principal qu'à une simple majorité, les juges délibéreront entr'eux sur le même point, et si l'avis de la minorité des jurés est adopté par la majorité des juges, de telle sorte qu'en réunissant le nombre des voix, ce nombre excède celui de la majorité des jurés et de la minorité des juges, l'avis favorable à l'accusé prevaudra."

<sup>2</sup> It is the court, not the jury, that fixes the amount of these. Before the late law, the civil party, even when successful, was liable to pay the costs when the accused could not. The son of Fualdes, an officer of the *ministère public* at Rhodes assassinated in 1817, became liable to the amount of more than 20,000 francs in this manner; but the costs were remitted by the government. The late law enacts, that in cases submitted to a jury, the civil party who has not failed, shall never be liable for costs. The accused has also a claim for damages against those who have falsely

in a low voice, or retire for that purpose. The judgment is given aloud. Before pronouncing it, the president is bound to read the text of the law upon which it is founded. The judgment is taken down by the registrar, and signed by the judges. The accused, if found guilty, has three days during which to appeal to the Court of Cassation against the judgment. Of this the president apprises him. The public prosecutor and the civil party have the same: but in the case of acquittal, they have only twenty-four hours for that purpose. The sentence is executed within twenty-four hours after the expiration of these delays, if the accused has not appealed, or within twenty-four hours after the reception of the judgment rejecting the appeal. There are three cases, however, in which the minister of justice may direct the judgment to be revised; 1. When two persons have been condemned for the same crime, in a manner rendering it impossible for both sentences to be just. 2. When, after a condemnation for homicide, reasonable proof appears that the person supposed to be killed is living. 3. When, after a condemnation, a principal witness is prosecuted for false testimony. In this case, the execution of the sentence would be suspended until the result of the prosecution were known.

In the Tribunal of Correctional Police there is no jury, and the complaining party may cite the accused before the court which has jurisdiction over the offence, without the intervention of the public prosecutor, though the prosecution is still conducted by the latter. Neither is there any private preliminary inquiry. The instruction must be public, under pain of nullity. The procureur du roi, the civil party, or his counsel,<sup>1</sup> and, in delicts relating to the forest, certain officers appointed in that behalf, expose the affair; the *procès verbaux* or reports, if any have been drawn up, are read by the registrar,<sup>2</sup> the witnesses on both sides are heard, and the necessary

denounced him to the police, and the public prosecutor is bound to inform him of their names.

<sup>1</sup> La partie civile ou son défenseur, art. 190. See a learned note in M. Berriat St. Prix's *Cour de Droit Criminel*, p. 115, on the question whether the court has the power of preventing the party himself from being heard.

<sup>2</sup> In the inferior courts, a *procès verbal*, drawn by a competent officer, does not admit of contradiction.

exhibits made; the accused is then interrogated;<sup>1</sup> the accused states his defence, the procureur sums up the matter, gives his conclusions, and the accused replies; sentence is pronounced immediately, or, at latest, at the audience following that on which the instruction shall have terminated. If the offence be deemed a *crime*, a warrant of apprehension is ordered immediately, and the accused is delivered over to the judge of instruction. If the offence be merely a *contravention*, which is properly within the jurisdiction of the tribunal of simple police, the court may notwithstanding apply the penalty, unless the public prosecutor or the civil party objects. In this case there is no appeal, that is, no appeal properly so called; for the Court of Cassation has power to annul any judgment for want of necessary form, whether final or not by the terms of the code. The appeal against a regular judgment on a *delict* lies to the Cour Royale, if sitting in the same department; otherwise to the tribunal of the chief place of the department.<sup>2</sup> The intention to appeal must be notified within ten days,<sup>3</sup> during which time, and during the pendency of the appeal, execution is suspended. But by the late law, the accused is to be set at liberty at the expiration of three days; if no appeal be notified. The judgment carries costs.

In the Tribunal of Simple Police the course of proceeding is essentially the same, only rather more rapid and summary. Thus, the accused must appear within twenty-four hours in person or by deputy. If the offence be of a higher order than a *contravention*, the court refers the matter to the procureur du roi, who take what steps may be necessary. When the judgment pronounces an imprisonment, or when the fines, restitutions and other civil reparations exceed the sum of five francs over and above the expenses, an appeal lies to the tribunal of correctional police. Every three months the judges of simple police (*maires* and *juges de paix*) are bound to transmit to the procureur du roi an abstract of all sentences of imprisonment pronounced by them, which is forwarded to the procureur general of the Cour Royale.

<sup>1</sup> If the alleged *delict* be not punishable by imprisonment, the accused may appear by an *avoué*, unless his appearance in person is required by the court.

<sup>2</sup> See the regulations, art. 200, 201.

<sup>3</sup> The *Ministère Public* of the court of appeal has a longer time allowed him. Art. 205.

To prevent the possibility of mistake, we shall close this account with a list of all the regular courts and judges, both civil and criminal, of France. These are:

*Maires*, whose only judicial capacity is as judges of simple police; *Juges de Paix*, whose capacity is threefold, namely, as conciliators, as judges of simple police, and as judges in civil causes to the amount of 100 francs; *Tribunaux de Commerce*, whose capacity is told by their name; *Tribunaux de Première Instance*, which are courts of appeal for all judgments rendered by the inferior judges abovementioned, have original jurisdiction in all civil causes not specially assigned to other courts, constitute the tribunals of correctional police, and furnish the chamber of council for the preliminary investigation of crimes; *Cours d'Assises*, courts exclusively for the trial of crimes; *Cours Royales*, which are courts of appeal for all the judgments subject to appeal of the courts of first instance, form the second chamber of inquiry which decides on the sufficiency of the accusation in matters of crime, and assist in forming the assize court; *Cour de Cassation*, whose functions are too multifarious to be incidentally described; suffice it to say, that it exercises a general regulating power over all the whole kingdom, and quashes all judgments contrary to law. The Chamber of Peers has jurisdiction over its own members, and over certain high political crimes. The *Conseils de Prefecture* and the *Conseil d'Etat* have large judicial powers in the administrative departments, but it is our intention to devote a separate article to them.

Where large discretionary powers are bestowed, the character of a system will almost exclusively depend on the spirit in which justice is administered under it, and an account may well be thought incomplete which does not contain some information on the point. The writer, therefore, will briefly state the general impression left on his own mind, after reading a good many of the juridical writings, mixing a good deal with the lawyers, and attending frequently in the different tribunals, of France.

The object seemingly ever present to the framers of the code of criminal procedure and the founders of the French system of police, (to say nothing of their political subserviency), was to prevent the escape of guilt, at all hazards

to innocence, and at any sacrifice of liberty. No man can doubt of it who studies the regulations in question attentively.

As is almost always, perhaps necessarily, the case, the ministers of justice have caught the tone of the lawgiver and become infected with the spirit of the laws.<sup>1</sup> Prosecutions are founded on presumptions far too light, when the consequences to the presumed offender are calculated; the accused is kept in prison, whilst all conceivable means, however dilatory, of procuring evidence against him are resorted to; and the interrogatory, combined with imprisonment, is so used as to leave the most arbitrary judge little reason to regret that the employment of direct torture is prohibited. This charge is of a nature to require proof, and the most decisive presents itself:

"The individual who is subjected to this description of torture," says M. Comte,<sup>2</sup> a man of distinguished talent and undoubted integrity, "and every accused person may be subjected to it, is thrown into a dungeon, most frequently narrow, damp, deprived of air, paved with stone, and only receiving air through a wooden bellows (*soufflet de bois*) fitted to a grated window. A miserable straw pallet, and a trough which completes the infection of the air breathed in it, form its only furniture. No chair, no table, is tolerated; reading and writing are alike forbidden in it; bread and water, in small quantities, are the only nourishment allowed: on entering, the accused is sometimes deprived of a part of his clothes."

M. Béranger draws a terrific picture of the mode of interrogating and tormenting by turns.<sup>3</sup> M. Rey quotes and confirms these authorities.

"But it is impossible to give a complete picture of the sufferings which are or can be inflicted on the accused confined in secret; these vary according to the genius of the officer of instruction, of the gaoler, of the turnkey, of the police, in a word, of all the individuals appointed for the infliction of this new kind of torture. The period during which the accused can be kept in secret is in-

<sup>1</sup> M. D'Eyraud (vol. i. p. 292) tells us of an advocate general who charged English jurisprudence with "a puerile apprehension of punishing the innocent."

<sup>2</sup> *Des Pouvoirs et des Obligations des Jurys*, par Richard Phillips, traduit de l'Anglais, par M. Comte.—Preface.

<sup>3</sup> *De la Justice Criminelle en France*, tit. ii. ch. 1. s. 9 & 10. The author was many years Advocate General at Grenoble, and is highly esteemed as a criminalist.

definite, and has no other bounds than the will of the judge ; some have been detained during three months, others during five months, others during eleven months. We have seen accused persons who have been thus detained during eighteen months and a half ; there was nothing to prevent their secret detention from becoming perpetual. Those whose secret confinement is thus prolonged, sometimes end by losing their reason. Such, I repeat, are the sufferings that five or six hundred delegates of the executive power, arbitrarily chosen, may inflict on every Frenchman, without form of procedure."

Two or three of his illustrative anecdotes are singular :

" An accused, against whom there were but slight presumptions, and whom they were soon obliged to set at liberty, had constantly denied the fact of which he was accused, in spite of the rigor of the ordinary seclusion. What course does the judge of instruction pursue ? He removes him from his dungeon, where there was at least a little light and air, plunges him into a vaulted cell, of seven or eight feet square, which had no other opening than a wicket fitted to the door, and then had the barbarity to close this wicket. But what adds, if possible, to the horror of this treatment, is the unworthiness of the grounds of excuse which the gaoler alleged when reproached with it. It is customary for certain prisoners, on payment of a sum, to be allowed to occupy a part of the gaoler's apartments. Now, in the case in question, the gaoler had as boarders some rich smugglers, who were often in a room near the cell, and who, in other respects, enjoyed all the conveniences of life. Well ! the gaoler said he had only shut the wicket for fear these gentlemen should be incommoded by the infected air which escaped from the cell where this unfortunate was buried alive."

According to him, promises and indulgences, as well as threats and imprisonment, are employed to extort confessions and discoveries :

" I remember a celebrated case decided on the banks of the Rhine, in which one of the accused denounced some one of his companions in misfortune every time he was permitted to see his wife. The affections and weaknesses of the accused are thus taken advantage of to extract discoveries ; and I also remember that, in the same affair, similar results were obtained by giving new clothes to a man who was excessively vain."<sup>1</sup>

M. Carnot, in the Tract before named, speaks of the *mise*

<sup>1</sup> Vol. i. p. 306—309.

*au secret*, as an anticipated hell; and M. Cottu, in his well-known work, gives an equally striking testimony as to the other points of our accusation:

"We therefore make no scruple of detaining a prisoner in gaol so long as any hope remains of obtaining evidence of his guilt,<sup>1</sup> of preventing him from holding any communication, pressing him with questions, surrounding him with snares, precipitating him into contradictions, and of offering him a thousand various baits to induce him to acknowledge his crime."

This writer gives the following specimen of an examination:—

"*Magistrate.* Your evasions as to the period of your leaving M . . . . and as to the time when you said you had the silver watch in your possession, together with your lie to the justice of peace, leave no room for doubting that what you say is false, and that your object in concealing the truth is to clear yourself of the robbery with which you stand charged.

"*Prisoner.* What would you have me answer? I did not commit the robbery.

"*Magistrate.* Is it not true that, after getting into the house of Mr. A., you opened his closet, and forcing the drawer, took out the articles now shown to you?

"*Prisoner.* I did not get into Mr. A.'s house, and I did not take the articles of plate now shown.

"*Magistrate.* Besides the plate now shown, did you not take a silver time-piece and silver cups?

"*Prisoner.* I took neither watch nor cups.

"*Magistrate.* Did you not also take a sum of ——— wrapped up in a white canvass bag, and consisting of, &c.

"*Prisoner.* No.

"*Magistrate.* Did you not conceal the plate under a mound of earth?

"*Prisoner.* Since I didn't take it, I couldn't hide it there.

"*Magistrate.* What instrument did you use to open Mr. A.'s closet?

"*Prisoner.* I am not a thief to open any body's closet.

<sup>1</sup> We ourselves can speak positively as to one case in which the accused was kept eighteen months in prison whilst the Judge of Instruction was collecting evidence; and we have seen it stated in a publication of character, though we forgot to verify the anecdote whilst in France, that M. Bourbon le Blanc, an advocate, was kept in prison from 1824 to 1830, when he was tried and acquitted. See also *Béranger*, tit. ii. ch. i. s. 15. *De la lenteur de l'Instruction*

" *Magistrate.* At what part did you gain entrance into Mr. A.'s house? Did you not leave it by the barn-door?

" *Prisoner.* I got in neither on one side nor the other, and therefore could not have left it by the barn-door.

" *Magistrate.* Was it not from the apprehension of a search warrant that you hid the plate under a mound of earth?

" *Prisoner.* I had no apprehension of a search warrant.

" *Magistrate.* A few days after the robbery did you not wrap up in a bit of paper some of the pieces of gold that you had taken, and throw them into the fore-court of Mr. A.?

" *Prisoner.* I was at no pains to throw them there, since I never took them.

" *Magistrate.* You were assuredly not the only one concerned in this robbery: if you have any accomplices, name them.

" *Prisoner.* I am at the head of no gang of thieves to have accomplices."—*Cottu*, pp. 259—260.

With regard to all that meets the eye, the proceedings in open court, our conclusion is of a widely different character, and we find ourselves directly opposed to M. Cottu. After drawing an absolutely revolting picture of the manner in which the president interrogates, the public prosecutor attacks, and the council for the prisoner defends, he thus remarks on the deliberations of the jury, and sums up the results of his experience:

" Finally, the jury withdraw to deliberate. . . . These endless deliberations of the jury are still the object of my astonishment. It is necessary to have witnessed the promptitude with which the jurors of England frame their verdict, to have a full idea how far short ours are in forming a right notion of their proper functions, and make us sigh over the inextricable embarrassments in which the law has entangled them.—*Cottu*, 272.

" Such is the true and unvarnished picture of our process of administering justice; a presiding judge exasperated against the prisoner, an attorney-general treating him as convicted before the verdict, a counsel scandalizing the auditory by the promulgation of doctrines the most pernicious; a weak and wavering jury, not daring to deliver their verdict, and forced to belie their own conscience; lastly, proceedings so procrastinated, perplexed, and wearisome, that they shock the good sense of the judges, and infuse into the jurors an invincible repugnance for their functions."—*Cottu*, pp. 273, 274.



With one exception, we saw nothing of all this. The manner in which the President frequently questions and cross-questions the prisoner, turning round to him and demanding what he has to say to it whenever an unfavourable piece of evidence comes out, is certainly very highly objectionable. But in all other respects we are by no means sure that we do not prefer the French mode of proceeding to our own, and the time occupied by the court and jury in deliberating, with the general caution and solemnity observed, is precisely that which impressed us the most favourably of all. The Newgate schoolmaster asserts that the average length of an Old Bailey trial, including the longest in the estimate, is about eight minutes and a half, and he tells us of a city judge who enjoyed the reputation of being able to get through sixty or seventy prisoners a day.<sup>1</sup> An assize court at Paris begins at half-past ten or eleven, and sits till four or till the trial then pending is concluded. The average cannot well exceed three or four trials a day. The case, to which the precedents in the Appendix relate, lasted about an hour and a half, there being only three witnesses for the prosecution and none for the defence; yet the only time that could, in any sense, be deemed wasted, was that occupied by the speech for the defence, which, though a very clever one, was quite useless, the charge being most conclusively proved. But there can be no doubt that an English counsel would have occupied as much time or more in a vain attempt to shake the credit of the witnesses, who in France can only be cross-examined through the President. Here, however, two important questions (as to the policy of admitting counsel's speeches, and the best mode of extracting truth from witnesses) spring up; and more would probably suggest themselves should we continue the parallel. Enough has been said to convey our own general impression, which is all we are at present anxious to convey.

To complete our task, nothing now remains but to subjoin a brief summary of the late changes in the criminal laws of France. Most of those affecting the Code of Procedure have

<sup>1</sup> See a series of papers entitled *The Schoolmaster's Experience in Newgate*, recently published in *Fraser's Magazine*, beginning June, 1832. We do not vouch for the strict accuracy of the above estimate, but it strikes us to be not far from the truth.

been mentioned already and there is only one of consequence enough to require a more particular attention.

The penal system of France prior to the Revolution had every vice that a system could have. The application of punishments was in a great measure discretionary in the judges, and the following were amongst the pains and penalties out of which they had to choose:—burning alive, breaking on the wheel, drawing with four horses, tearing off the flesh with red-hot pincers, beheading, hanging, quartering, gagging, whipping, suspending by the arm-pits, flogging, maiming, cutting out the tongue, branding, the pillory, the galleys, the forks, the iron collar, and some others which have already become matter for the antiquary. The judges also enjoyed the power of mangling the body and stigmatising the memory of the dead, in the cases of suicide, duel, resistance to justice, and *lèse-majesty*, divine or human.<sup>1</sup> The National Assembly swept all this complication of barbarisms away, reduced the punishment of death to the simple privation of life, and, in 1791, published a penal code in which the only punishments were death, irons, reclusion (imprisonment with labour in a house of force), solitary confinement, detention in a fortress, transportation, civic degradation, and the iron collar (*carcan*). In this code also it was laid down, as a sort of legislative base, that no punishment should be perpetual. So far there seems no great reason for complaint, but the desire of removing themselves as far as possible from their predecessors in authority, led these unpractised legislators into a fatal blunder as regarded the application of their punishments. “Forcibly struck with some grievous errors with which the tribunals were reproached, the Constituent Assembly thought that it was impossible to confine too narrowly the power conferred on the magistracy; they regulated, consequently, with an exact precision, the duration of the punishment to be applied to each particular act, and willed that, after the declaration of the jury, the function of the judge should be restricted to the mechanical application of the law.”<sup>2</sup>

The law of the 24th of October, 1795, (3 *Brumaire*, An. 4.)

<sup>1</sup> Prior to the ordinances of 1670 this list was much more extended. See the Ordinances of 1670, with the Commentary of Jousse.

<sup>2</sup> *Motifs du Code Penal*, Liv. 1.

though termed a Code of Delicts and Punishments, is mostly occupied with procedure, but it contains one singular enactment: "Dating from the day of the publication of the general peace, the punishment of death shall be abolished in the French republic."

We pass over the intervening period to come at once to the Code Penal of 1810, in which a third mode of apportioning punishment was tried. The old law allowed too much discretion to the judge: the Constituent Assembly, by a sage anticipation of Lord Wynford's principle, allowed none. The Code Napoleon, aiming at a *juste milieu*, left a certain degree of latitude to the judge, but carefully fixed a *minimum* and *maximum*, beyond which he was not at liberty to range. The *minimum*, however, was in most instances too high, and in some high enough for a *maximum*. The code, moreover, was justly chargeable with an unreasonable degree of severity throughout. Amongst other provisions, illustrating the spirit of its framers, it restored the punishments of branding and general confiscation abolished by the code of 1791, and declared in favour of the perpetuity of punishments. The consequence has been, that from the time juries were freely chosen, they have steadily refused to assist in executing the harsher parts of it, and a persevering warfare has been waged between public opinion and the law. The restrictions read to each jury before retiring, and constantly posted up in the jury room, would alone induce a shrewd suspicion that things had come, or were coming, to a very critical pass.<sup>1</sup> Prior to the revolution of 1830, popular feeling, though backed by the intelligence of the community, was not at all, or very little, attended to, and the only remarkable change during the fifteen years preceding that event, is suspected to have originated rather in a desire to extend the judicial power in a manner favourable to despotism, than in an enlightened wish to soften down the harshness of the law.<sup>2</sup> In a widely different spirit, and with most commendable dispatch, did the ministry of the movement proceed. Within a few months after the glorious three days they had caused the

<sup>1</sup> See the Extract post, p. 329.

<sup>2</sup> M. Lagarmitte (the writer of the able article in the German Review named in our list) accuses Peyronnet, then minister of justice, of supporting the law of 1824, as to childmurder, with this view.

project of the law just passed to be prepared, and as early as June 1831 it was in a condition to be laid before the Courts Royal for their advice. After undergoing considerable modifications in the interval,<sup>1</sup> it was presented to the Chamber of Deputies on the 31st of August 1831, where a committee was forthwith appointed to report upon it. This committee consisted of MM. Remusat and Renouard, two of the redactors of the *Globe* in its best days, M. Béranger, the distinguished author of the work frequently referred to in this article, M. Mérilhou, formerly Minister of Justice, MM. Duboys d'Angers, Parant and Fruchard, all three of judicial rank, and M. Sylvain Dumon, an advocate of high celebrity, who was appointed to draw up the report. We regret that our limits do not admit of a detailed examination of this document, which is replete with valuable information and instructive remark, not merely on the law in question, but on two subjects of particular interest to us at the present moment, transportation and penitentiaries. Generally speaking, it is favourable to the government plan, which, after a series of languid debates, was carried by an overwhelming majority, 212 to 34. Unless M. Lagarmitte be right in attributing the indifference shown throughout this discussion by the leading members, to the fact of men's minds being perfectly made up as to most of the principal points, it certainly furnishes a strong additional argument for those (the celebrated Rossi amongst the rest) who consider large legislative assemblies unfit for discussions of the kind. M. Dupin Aîné, for instance, spoke but once or twice, and then very shortly; and M. Odillon Barrot, who for integrity and talent combined has very few equals and certainly no superiors in France, appears to have limited his co-operation to a single effort of doubtful utility, a motion to keep transportation on the punishment list of the code. He succeeded, principally, we incline to think, from a general conviction of the disgracefully defective state of the places of confinement in France; and the transportation

<sup>1</sup> In the original project the punishment of civil death was abolished, but the clause was subsequently struck out. A motion for its abolition was afterwards made in the Chamber of Deputies, and supported with great ability by M. Taillandier, but in vain.

clause has been left, though a sub-amendment, proposed by M. Odillon Barrot himself, goes nigh to confessing its utter inutility.<sup>1</sup>

Great expectations were formed of the discussion in the Chamber of Peers, which boasts amongst its members some of the most distinguished jurists in France, as MM. Broglie, Decazes, Portalis, and Malleville. But only two or three material amendments were made by the peers, and the whole matter was disposed of in four or five sittings. It was said that the peers had got sulky or lost heart since the great victory achieved by democracy. At the final reading (23d March 1832) not a single voter against the project was to be found; a very suspicious unanimity. The royal sanction was given on the 28th of April following.

Having traced the progress, we shall now sum up the principal effects of the law.

Besides a general reduction of punishments, and the recasting of sundry definitions of crimes, this law abolishes the three punishments of mutilation, branding, and the iron collar in all cases; and the punishment of death in the following: 1. Plots not followed up by an attempt at execution; 2. coining or uttering false gold or silver coin legally current in France; 3. counterfeiting or using the state seals, effects of the public treasury, or bank notes; 4. many cases of arson; 5. murder joined to a delict, when the relation of cause and effect does not exist between the two; 6. robbery, with the

<sup>1</sup> "Tant que la gouvernement n'aura pas établi un lieu de deportation fixé par la loi, la peine de la deportation sera remplacée par celle de la detention." The best account of the discussion is given by M. Lagarmitte, who was present. M. Dumon speaks in the following terms of the French prisons in his report:—"The inconveniences of our places of confinement and prisons, the licentious life which reigns in them, the corrupting contagion which it propagates, have been so often demonstrated, and are so forcibly verified by the multiplicity of relapses into crime, that it will suffice to allude to them here. They have long since attracted the attention of government, and occupy its meditations. Distant voyages, profound studies, experiences carefully pursued, have for their object to import into France the system of laborious imprisonment, known under the name of the penitentiary system. But before this new prison discipline can be introduced, before its amending and repressing effects can be well verified, before a new penal scale can be prepared with reference to it, many years will doubtless elapse." If so, it is to be hoped that the enlightened exertions of Archbishop Whately will enable us to take the lead in Europe. Thanks to her Websters and Livingstones, America at present stands first.

five circumstances of aggravation; i. e. in the night, by more persons than one, with arms, in a house or under the show of authority, with violence or threats;<sup>1</sup> 7. the concealment of stolen goods, when the theft is punishable by death; 8. illegal arrest with a false costume and threat of death.<sup>2</sup> The crime of omitting to reveal a conspiracy against the state is erased from the code. On the other hand, certain punishments have been rendered more severe, as those affecting public functionaries in the case of a violation of domicile, bribery, and the opening of letters entrusted to the post; and a few new offences of a minor order have been created, as the administering of substances hurtful to health, the abuse of trust by an unpaid mandatory, the embezzlement of effects taken in execution, &c. But the grand feature of the new law is the provision authorising the jury to declare the existence of attenuating circumstances, thereby compelling the court to reduce the punishment a step, and conferring the option of reducing it two. This may be termed the fourth great experiment, in a very difficult department of legislation, tried in France within the last fifty years.

The germ of the plan is discoverable in the code. The jury, under it, have always exercised the power of negating certain circumstances of aggravation foreseen by the law; and (by Art. 463 of the Code Penal) in all cases punishable by imprisonment, where the injury did not exceed twenty-five francs and the circumstances appeared attenuating, the judges were authorised to reduce the imprisonment and the fine. Neither of these analogies can be regarded in the light of a precedent, though the latter was repeatedly referred to in the course of the controversy. With regard to the former of them, the aggravating circumstances that might be negated were specified by the law; and under Art. 463, the Judges had an unfettered option to exercise. Under the new law, however, the attenuating circumstances are neither defined beforehand nor to be specified in the verdict, and the court *must* re-

<sup>1</sup> Code Penal, Art. 381.

<sup>2</sup> We take this summary from M. Chauveau's work—a very useful compilation, with much valuable observation interspersed—but he makes the list to consist of eight in his preface and nine in his text, p. 84. The difference seems merely numerical.

duce the punishment a degree. The measure has all the risk, if not all the merit, of novelty, and its projectors have still many grave objections, which were hardly suggested and certainly not answered at the time, to contend against. The hardest to get over is the uncertainty the measure may produce.

Nothing short of positive necessity has hitherto been thought sufficient to excuse the legislator for devolving any portion of his peculiar province, the fixation of punishment, on the judge; but here the fixation of punishment is devolved on popular feeling, with all that tendency to fluctuate to which every thing dependent on popular feeling is exposed. The chief difficulty under the old system arose from the refusal of juries to execute the law. The obvious remedy was to render the law such as juries in general would execute, instead of giving them the power of making as well as executing it, which was cutting not solving the knot. On turning to art. 463, as now extended, it will be seen that each jury has virtually the power of first saying whether the accused be guilty or not, and then declaring whether he shall be punished with death or hard labour—hard labour for life or for a time—transportation or simple banishment—in a word, whether the maximum or minimum of afflictive punishment, or a punishment of a totally different order, shall be applied.<sup>1</sup>

M. Dumon, the reporter to the chamber of deputies, had evidently caught a glimpse of the consequences: "Your commission," says he, "has not shut its eyes to the abuse the jury might make of this system. The declaration of attenuating circumstances may become a matter of course, and thus all punishments be diminished by a degree. Who can tell the consequence of this shock in the penal system? The general leaning, which for some years has been drawing juries towards indulgence, and even towards impunity, may excite an apprehension of its using with little judgment or moderation the power confided to it." He does not answer this objection perfectly, nor would he answer the real objection if he did. It is not merely the influence of popular feeling that we fear, but its acting by

<sup>1</sup> "In the cases where the code pronounces the maximum of an afflictive punishment, if there exist attenuating circumstances, the court shall apply the minimum of the punishment, or even the inferior punishment." Code Penal, art. 463.

fits and starts, in under-currents and at intervals; a fear aggravated in no trifling degree by the recollection, that counsel make speeches in all sorts of cases in France. Should the declaration grow into a matter of course, it might be fairly argued that the virtual change thus effected in the law was one that ought to be sanctioned by the legislature; but how many phases must the system pass through, and what strange inequalities will it present, before the general feeling becomes strong and uniform enough for such a conclusion to be drawn from it. M. Bastard, the reporter named by the peers, was yet more plain in the expression of his doubts: and the Duc de Broglie, a leading member of the committee and a very high authority on such matters, was understood to be decidedly adverse to the plan.

One of the most enlightened judges in France, after acting for fifteen days as president of an assize court at Paris since the law came into operation, told the writer that it had hitherto worked well; which proves that for the present, at any rate, the legislature and the people agree.

H.

#### APPENDIX OF FORMS.

(Translated literally.)

1. *Procès Verbal.* This day, the 6th of July, 1832, at half-past three, before us B.<sup>r</sup>B. Mayor of P., Arrondissement of St. Denis, Department of the Seine, appeared one Deschamps, fancy shopkeeper, resident at Paris, Rue Montholon, No. 32; who declared to us, that this day, at two o'clock, as he was walking in a path near the farm of R. in the territory of P., he was met in the said path by a *quidam*, who demanded his money, and threw himself upon him; took from him twenty-seven sous which he had in his waistcoat pocket, as well as a gold watch with the name of the watch-maker engraved, and knocked him down: that then the said *quidam* fled along the side of the canal of the farm around which he attempted to pass, but at length the said *quidam* arriving at the bank of the canal, threw himself into it completely dressed, and crossed it, and then fled across the fields, and was afterwards arrested by some mowers who had heard the cry of thieves.

At this declaration were present J. C. and J. R. (describing them) who said, that having heard the said Deschamps cry thieves, they had run after the thief, had seen him throw himself into the water, and had followed and overtaken him; that the said person, as they were bringing him back, told them that he had thrown away the watch in a field, to which he offered to conduct the owner with one of the soldiers who had come up in the interim, and that he did in fact conduct them to a field of corn where he said he had thrown it down, but that it was not to be found.

Appeared also A. C. soldier, &c. who deposed, that jointly with J. D. soldier, &c. he had searched the said person and found the sum of 27 sous in his waistcoat pockets, and that he had also searched for the watch in the field but found nothing.



And upon these different declarations, we have caused to be brought to our *mairie* the *quidam* in question, who being interrogated by us, has declared his name to be, Jean Pecqueur, journeyman saddler, residing at Paris, Rue du Rocher, No. 8; of all which we have drawn up the present *procès verbal*, which the persons who have appeared have signed with us at the *mairie* of P., with the exception of the said C. and R. (two of the witnesses) who have declared that they do not know how, and in the presence of Mons. P. E. brigadier of gendarmerie, who has also signed.

Signed, &c.

2. *Report of the Judge of Instruction.* This consists exclusively of copies of the depositions of the person robbed and the witnesses, each deposition being headed with the formal style of the Court, and certified by the Judge of Instruction as having been read over to and signed by the deponent.

3. *Report of the Chamber of Council.* We Judges composing the second Chamber of the Tribunal of First Instance of the Seine, united in the Chamber of Council conformably to the 127th Art. of the Code of Criminal Instruction, seeing the procedure instructed against the said J. P.; seeing the report of M. the Judge of Instruction: considering that there results from the following facts: (here follows a brief summary of the facts above stated): considering that there results from the instruction sufficient presumption against J. P. of having on the 6th of July stolen on a public highway, and by the aid of violence, a watch and 27 sous, to the prejudice of the said Deschamps: considering that this crime, contemplated by Art. 385 of the Code Penal, may import afflictive and infamous punishments: We order that the *procès verbaux*, and the other documents and matters (*pièces*) serving to conviction, be transmitted to M. the Procureur General of the Court Royal. We also order, that the said J. P. (minutely describing him) be arrested and conducted to the house of justice which shall be designated by the Court Royal. We require all depositaries of the public force to aid in the execution of the present ordinance. Made at the Palace of Justice in Paris, the 31st of July, in the Chamber of Council, present M.M.\*\*\* Judges, &c. who have affixed their signatures.

Signed, &c.

4. *Arret de Renvoi, or Mise en Accusation by the Cour Royale.* The Court being assembled in the Chamber of Council, M. A. substitute of M. the Procureur General entered, and made the report of the process instructed against J. P. The Registrar read the *pièces* of the process, which were left on the bureau; the Substitute laid upon the bureau his written requisition, signed by him, dated the 9th of August instant, terminated by the following conclusions: "We demand that it please the Court to order the *mise en accusation* of J. P.; and that he be sent before the Assise Court of the Department of the Seine, to be there judged according to law." The Substitute, as well as the Registrar, retired. The Court after having deliberated on it,—considering, that from the *pièces* of instruction, result sufficient charges against J. P. of having in July, 1832, fraudulently substracted on a public way, and by the help of violence, a gold watch and one franc 35 centimes, to the prejudice of Deschamps, crime contemplated by Arts. 379 and 385 of the Penal Code,—orders the *mise en accusation* of the said J. P., and sends him before the Assise Court of the Seine, to be there judged according to law,—confirms the warrant of apprehension rendered against him by the Tribunal of First Instance of the Seine, the tenor of which follows: (here the preceding document, No. 3, is recited at length). The Court, in consequence, orders, that the said J. P. be conducted into the house of confinement, and that the present judgment be executed with all due diligence by the Procureur General. Made at the Palace of Justice, &c.

Signed &c.

5. *Acts d'Accusation.* The Procureur General of the Court Royal of Paris, exposes that by a judgment of the 14th of August, 1832, the Court has ordered the *mise en accusation*, and the sending before the Assise Court of the Department of the Seine, of J. P., aged &c., born &c., residing &c. The Procureur General declares that from the *pièces* of the process result the following facts : Deschamps, an old man of seventy-four, was following, on the 6th of July last, a path on the territory of P., when an unknown demands his money, throws him down, and robs him of 27 sous, and his gold watch worth 150 francs. The unknown suddenly takes to flight, and crosses, with all his clothes on, the canal of O. Arrested on the spot, he was distinctly recognized by Deschamps. The 27 sous stolen were found upon him, and in the very money indicated by Deschamps. As to the watch, he offered to point out in a neighbouring field the place where he had hidden it, but on condition of being taken there with one soldier and the person robbed only. This search thus made was entirely fruitless. Consequently, J. P. is accused of having, in July, 1832, fraudulently subtracted, on a public way, and by the aid of violence, a gold watch, one franc and 35 centimes, to the prejudice of Deschamps, crime contemplated by Arts. 379 and 383 of the Penal Code. Made at the *Parquet* (place assigned to the *Ministère Public*) of the Court Royal of Paris, the 8th of September, 1832. (Signed) PERSIL.

[Copies of all the above documents had been delivered to the prisoner ; and his counsel, at the conclusion of the trial, obligingly presented them to the writer. For the Forms of the Question Paper submitted to the Jury and the Instructions hung up in their room, he has to thank a Judge of the Cour Royale.]

6. *Verdict ; being the Questions put to, and the Answers returned by, the Jury.*  
Q. 1. Is J. P. guilty of having, in July 1832, fraudulently subtracted a gold watch, and the sum of one franc 35 centimes, to the prejudice of the said Deschamps ?

A. 1. Yes, he is guilty by a majority of more than seven voices.

Q. 2. Did this fraudulent subtraction take place in a public way ?

A. 2. Yes, he is guilty by a majority of more than seven voices.

Q. 3. Was it committed by the aid of violence ?

A. 3. Yes, he is guilty by a majority of more than seven voices.

In a column headed *Attenuating Circumstances*, was added :

Yes, by a majority of more than seven voices, there are attenuating circumstances.

The paper is signed by the chief of the Jury, the Registrar, and the President.

The Jury were about a quarter of an hour in deliberation ; but the only point of doubt was understood to be, whether the path was a public one or not. The accused was sentenced to six years imprisonment.

*Instructions to the Jury.*—The paper hung up in the jury-room would occupy three or four pages to print. It quotes the Articles of the Code relating to the duties and management of Juries, and amongst other warnings contains the following, already alluded to in the text : "What is essential not to be lost sight of is, that every deliberation of the Jury refers to the Act of Accusation ; it is to the facts which constitute it and depend upon it, that they ought exclusively to apply themselves ; and they fail in their principal duty, when, thinking of the dispositions of the Penal Laws, they consider the consequences the declaration they are to make may have with reference to the accused. Their mission has for object neither the pursuit nor the punishment of offences ; they are only called to decide whether the accused be or be not guilty of the crime imputed to him."

ART. III.—ON THE ADMISSIBILITY OF PAROL EVIDENCE IN SUITS IN EQUITY FOR A SPECIFIC PERFORMANCE OF A CONTRACT IN WRITING.

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WE shall discuss this subject, first, with reference to the plaintiff in a suit for a specific performance, and, secondly, with reference to the defendant.

1. "No action shall be brought whereby to charge any person upon any agreement made upon any contract or sale of lands, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."<sup>1</sup> These words are clear; no person shall be compelled to perform an agreement which is not wholly in writing; the plaintiff must show in writing, under the hand of the defendant or his agent, every term of the contract he seeks to enforce.

A bill was filed, to compel the defendant to accept a lease, pursuant to a written agreement; the defendant objected, because certain land called Ox Lane comprised in the agreement, was not in the lease; and the bill was dismissed, though the plaintiff offered parol evidence to prove that the defendant had verbally agreed that that land should be omitted.<sup>2</sup>

Penelope Woollam filed a bill against Hearn, to compel him to execute a lease at the rent of 60*l.*, though 70*l.* was the rent mentioned in a written agreement between them. Woollam offered parol evidence to prove that 70*l.* was inserted by mistake and fraud, for Hearn said she should have a lease on the same terms he held the premises, and she had discovered, since the agreement, that he paid only 60*l.* rent. The evidence was rejected and the bill dismissed.<sup>3</sup> Sir Wm. Grant, M. R., observed, there is no agreement in writing for

<sup>1</sup> 29 Car. 2. c. 3. s. 4. Though a parol lease for less than three years is valid, yet this section prevents the lessor from suing the lessee for damages for not taking possession.—*Edge v. Stafford*, 1 Crom. & Jer. 391.

<sup>2</sup> *Lawson v. Laude*, 1 Dick. 346.

<sup>3</sup> *Woollam v. Hearn*, 7 Ves. 217.

a lease at the rent of 60*l*; the agreement says 70*l*. And his Honor said, "independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule of law was adopted. Though the written instrument does not contain the terms, it must, in contemplation of law, be taken to contain the agreement, as furnishing better evidence than any parol can supply." Thus, then, when a plaintiff sets up an agreement which is plainly contrary to the written agreement between him and the defendant, he opposes not merely the statute of frauds, but a rule of the common law.

If, on a sale by auction, the particular and conditions referred to by the memorandum in writing, signed by the parties, be equivocal, e. g. whether the purchaser shall pay for the wood in addition or not, though the auctioneer declares the certainty, as that the purchaser is to pay for the wood in addition, yet the vendor cannot avail himself of the auctioneer's declaration to compel the purchaser to complete and pay for the wood in addition, if he (the purchaser) insists that he is entitled to it without any further payment.<sup>1</sup>

A. agreed verbally with B. to grant him a lease at 80*l*. a year rent, clear of all taxes and deductions; a written agreement was shortly after signed by the parties, but it did not express that the rent was to be clear of taxes. A. filed a bill to compel B. to accept a lease at a net rent of 80*l*. relying upon the verbal agreement, which was proved by parol evidence; but this was rejected and the bill dismissed.<sup>2</sup> "You shall not come for the performance of a written agreement with a variation, which you say was made by parol; because, therefore, it was not effectually made; and, therefore, you must either take the written agreement or have the bill dismissed."<sup>3</sup>

<sup>1</sup> *Jenkinson v. Pepys*, cited 6 Ves. 330. 15 Ves. 521. 1 Ves. & B. 528. *Higginson v. Clowes*, 15 Ves. 516. *Reynolds v. Waring*, 1 Younge, 346, 351.

<sup>2</sup> *Rich v. Jackson*, 6 Ves. 334 n. 4 Br. c. c. 514. *Jordan v. Sawkins*, 3 Bro. c. c. 388. 1 Ves. jun. 402.

<sup>3</sup> *Verba Lord Eldon in Robson v. Collins*, 7 Ves. 132.

Though the statute says that no person shall be charged upon any contract, unless it be in writing, and signed by him, or on his behalf, it makes no provision for the construction of a written contract; it merely says, an unwritten agreement shall not bind.<sup>1</sup> Thus the rules of law as to the construction of written contracts remain as before the statute; if then, for example, there be a latent ambiguity in an agreement, the plaintiff in a suit for a specific performance is allowed to give parol evidence to explain and remove it; but it should be observed, that however clear and strong the parol evidence of the plaintiff may be, yet, if the defendant positively deny the offered explanation, the Court will not compel him to complete the contract according to it; and certainly the making a decree solely on the strength of such parol evidence, would be a partial infraction of the statute; for an agreement, in which there is a latent ambiguity, is not complete; there is an opening left for that fraud which the statute was meant to prevent.<sup>2</sup> These principles are well illustrated in a very important case before Lord Eldon,<sup>3</sup> which we will now consider at more length than usual, for the real points decided in it do not appear to us to be stated by Sir Edward Sugden, in his volume on Vendors and Purchasers, with his usual accuracy.

Christopher Stangroom was in possession, by lease from the Marquis Townsend, of a farm in the parish of Langham, consisting of 446 *a.* 3 *r.* 23 *p.*, at a rent of 290*l.* Jane Garret was tenant of another farm under the Marquis: and these two farms comprised all the lands belonging to the Marquis in that parish. Speering, agent to the Marquis, entered into an agreement, in writing, with Stangroom, for a renewal of the

<sup>1</sup> This view of the statute is stated by Lord C. B. Skinner in *Kann and Hughes*, 7 T. R. 350 n: by Lord Ellenborough in *Cuff v. Penn*, 1 M. & S. 26; and by Lord Redesdale, 1 Scho. & Lef. 39.

<sup>2</sup> *Ambiguitas verborum latens, verificatione suppletur.* The extent and meaning of this maxim is well explained by Tindal, C. J. in a recent case: "In all cases in which a difficulty arises in applying the words of a will to the thing which is the subject matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject matter really intended to be devised, or who was the person really intended to take under the will." *Miller v. Travers*, 8 Bing. 247.

<sup>3</sup> *Lord Townsend v. Stangroom*, 6 Ves. 328.

lease, which agreement was entitled "A statement of the quantity of land and annual value of the farm belonging to the Marquis Townsend in Langham, in the occupation of C. Stangroom, as proposed to be let upon a lease for twenty-one years from Michaelmas 1797." The agreement then stated the arable and pasture land particularly by acres, roods, and perches, in all 425*a.* 1*r.* and 26*p.* "be the same more or less;" that the rent was to be 270*l.* a year, and expressed some other terms.

Upon applying this written agreement to the subject of it, it is obvious there is a latent ambiguity; the head of it professes that the farm then in the occupation of C. S. should be comprised in the new lease; but the enumeration of the number of acres gives twenty-one acres less than the actual number in the farm then occupied by C. S.

The Marquis filed a bill against Stangroom, to compel him to accept a lease of 425*a.* at 270*l.* a year, and offered parol evidence to account for the difference between the 446*a.* and the 425*a.* This evidence proved, that, before the agreement was signed, Stangroom knew that the Marquis had agreed to demise 24*a.*, part of the farm then in the occupation of Stangroom, to Jane Garret, and that Stangroom had consented that 3*a.*, part of Garret's farm, should be included in his, Stangroom's, new lease. Stangroom, by his answer, denied any knowledge of Mrs. Garret's agreement for any part of his farm, or any knowledge of any such intention.

Lord Chancellor Eldon observed in his judgment, "I will not say that upon the evidence without the answer I should not have had so much doubt, whether I ought not to rectify the agreement, as to take more time to consider whether the bill should be dismissed. *But the evidence must be taken, due regard being had to the answer*; and the Court is not to decide upon the allegation as to the probability against the answer, not only to take out of his contract part of the land he held, but to insert land which he never did hold, and of which he states he never did agree to become the occupier." His Lordship then commented upon the evidence, and considered it clear that Stangroom knew that Mrs. Garret had an agreement for the 24*a.* He then proceeded: "the question therefore is, whether upon the face of the agreement, con-

nected with a latent circumstance now disclosed, [the quantity in the farm occupied by Stangroom before the agreement], you are now at liberty, upon the latent fact disclosed, to inquire into the nature of the agreement itself, if there is something upon the face of it inconsistent with that fact disclosed: whether evidence can be admitted upon the ground of that fact disclosed; one part of the agreement importing what the other part does not import." . . . . "I cannot possibly execute an agreement so perfectly different from that Stangroom has signed. I am to consider it with reference to his answer, by which he has positively denied it. The whole agreement is to be taken together, and the whole must be executed or abandoned. I cannot find out what was the parcel of land in the possession of Mrs. Garret that he was to have. It is not distinctly stated; nor is it admitted. I cannot, therefore, give a specific performance upon that bill."

What then is the result of this case? A lessor seeks to enforce an agreement for a lease in which there is a latent ambiguity, and produces parol evidence which explains such ambiguity in part: the defendant, the intended lessee, in his answer denies the evidence. Lord Eldon receives the parol evidence of the plaintiff, but has at the same time regard to the answer of the defendant: and his Lordship dismisses the bill on the ground of the denial in the answer, and also because admitting the parol evidence it did not fully explain the ambiguity. This case, too, is an illustration of an observation made by Sir Edward Sugden,—“In some cases a latent ambiguity may be fatal. Parol evidence may be adduced to prove the ambiguity, when none sufficiently satisfactory can be offered to explain it.”<sup>1</sup>

In *Shelburne v. Inchiquin*, Lord Thurlow observed, “I think it is impossible to refuse as incompetent parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties. To be sure it must be strong irrefragable evidence, but I do not think I can reject it as incompetent. It is the only way of explaining latent ambiguities. So, if there are two manors of Dale, you must make out that fact by parol evidence; and if

<sup>1</sup> V. and P. 138.

you go to parol evidence to raise the ambiguity, you cannot well refuse it to explain such ambiguity."<sup>1</sup> In the above case of *Townsend v. Stangroom* it certainly appears to have been Lord Eldon's opinion, that, however strong parol evidence might be adduced by a plaintiff to explain a latent ambiguity, yet, if it was denied by the defendant, specific performance could not be decreed; and this probably was also Lord Thurlow's opinion; for in another case he observed, that a court of equity would upon parol evidence correct a mistake in a deed; but "then it should be proved as much to the satisfaction of the court as if it were admitted: the difficulty of this is so great, that there is no instance of its prevailing against a party insisting that there was no mistake."<sup>2</sup> Though, then the case of *Townsend v. Stangroom* is not a direct authority, for there the parol evidence was not sufficient completely to explain the ambiguity, yet the opinions of Lords Thurlow and Eldon are so weighty and seem so much in accordance with the Statute of Frauds, that it may be concluded that the clearest parol evidence to explain a latent ambiguity or mistake will not avail a plaintiff seeking a specific performance, if the defendant deny it.

2. We come now to the second head of our observations: in what cases a defendant in a suit for a specific performance may avail himself of parol evidence. Before we proceed with this discussion, it is right that we should first shortly state the origin and reason of decrees for specific performance. Every party who has an agreement might certainly on the breach of it go into a court of law and obtain damages, but then it is obvious that in many cases damages would be a very inadequate compensation; hence the desire of a court of equity to do complete justice induces it to give the injured party an additional and a better remedy, to give him the very thing contracted for and not merely the value of it according to the estimation of a jury. This is unquestionably the origin of decrees for a specific performance, and hence flow the rules by which courts of equity have guided themselves in this matter. Hence, if damages would be commensurate to the injury which

<sup>1</sup> 1 Bro. C. C. 341: see 8 Bing. 248.

<sup>2</sup> *Irnham v. Child*, 1 Bro. C. C. 93.



accrues from the breach of the agreement, as an agreement to purchase stock, equity refuses to interfere, for the party is not injured by being left to his remedy at law. Hence, too, equity will not interfere in favour of a party who has in the making of the contract shown himself unworthy of its protection by fraud, circumvention or deceit, or even by conduct merely improper or dishonourable. Again, equity will not, on the pretence of redressing the wrongs of one party, lend its aid to injure another; thus, if a defendant show that he cannot make a good title without exposing himself to an action or suit, or that the terms of the agreement are more comprehensive than he understood or intended, specific performance will not be decreed.<sup>1</sup>

To convince a court that it should not afford this extraordinary remedy, a defendant may avail himself of parol evidence; he may say, I seek not to infringe the provisions of the statute of frauds, I admit the written agreement, but I will show by parol evidence that there are circumstances dehors the written agreement, but part of or intimately connected with the contract, which prove that the plaintiff is deserving of no favour. Such are the principles on which the defendant in a suit for a specific performance may avail himself of parol evidence to resist a decree; he may use such evidence to show in the conduct of the other during the making of the contract, fraud, concealment, misrepresentation, or any species of unfair dealing. It is not within our present purpose to show what degree or kind of dishonesty will exclude a party contracting from the interposition of the court, but we will cite some examples for the sake of illustrating our principles.

We may first observe that the maxim *caveat emptor* is not applicable here. The court is to be satisfied not merely that the defendant entered into a written agreement with his eyes open, but also that the conduct of the plaintiff is free from reproach.

If a purchaser be aware of a fact by which the value of the estate is considerably increased, as the death of an annuitant or tenant for life, and he knows that the vendor is ignorant of it, equity will not enforce the contract.<sup>2</sup> So, if a partner

<sup>1</sup> See 2 Scho. and Lef. 556. 1 Cox, 406.

<sup>2</sup> Turner v. Harvey, Jacob, 178.

purchase his co-partner's share in the joint business for a sum which he, the purchaser, knows from accounts in his possession, but which he conceals from his co-partner, to be inadequate.<sup>1</sup> So if a person contract ostensibly on behalf of another, but in reality for himself, he cannot demand a specific performance, at least, if it be shown that he obtained a better bargain by the concealment of the fact; and that the vendor was thereby injured.<sup>2</sup> So, too, if a purchaser contract knowing that there is a latent advantage in the estate as a mine, of which the vendor is ignorant, it is apprehended he, the purchaser, would be left to enforce his contract at law; most certainly so, if a word, a single word, were dropped to deceive the vendor on the subject.<sup>3</sup> Again equity will not assist a purchaser who contracts with a trustee who plainly neglects the interests of the cestuique trust and makes an improvident bargain.<sup>4</sup>

Even mere surprise on third persons at a sale by auction has been deemed sufficient to prevent the court from assisting a purchaser; as where the known agent of the seller bid for an estate on behalf of the purchaser, and other persons present, thinking he was bidding as a puffer on the part of the vendor, were deterred from bidding.<sup>5</sup>

Equity will not interfere in favour of a vendor who asserts that the property was valued by competent persons at, or even merely represents that it is worth, a larger sum than the fact;<sup>6</sup> who sells to a young man at a very inadequate price, so enormous, that all mankind must at the first mention of it concur in thinking it so;<sup>7</sup> who on the sale of leasehold property stated to be renewable on the payment of a small fine, knows that a much larger fine will be required than the purchaser is aware of;<sup>8</sup> who on the sale of a building site by auction states by the auctioneer that improvements will be

<sup>1</sup> *Maddeford v. Austivick*, 1 Simons, 89.

<sup>2</sup> See *Scott v. Langstaffe* and other cases cited in Sugden's V. and P. ch. iv. sect. 2. See also *Fellowes v. Lord Gwyder*, 1 Russ. & Myl. 83.

<sup>3</sup> *Jacob*, 178. See 2 Bro. C. C. 240.

<sup>4</sup> *Jacob*, 178. See *Bridger v. Rice*, 1 Jacob and W. 74.

<sup>5</sup> *Turning v. Morris*, 2 Br. C. C. 326. See *Mason v. Armitage*, 13 Ves. 25.

<sup>6</sup> *Buxton v. Lister*, 3 Atk. 386. *Wall v. Stubbs*, 1 Mad. 80.

<sup>7</sup> *Day v. Newman*, 2 Cox, 77.

<sup>8</sup> See 14 Ves. 149.

made which are not carried into effect;<sup>1</sup> who on the sale of leasehold premises falsely states the rent he reserves is the rent paid to the original lessor;<sup>2</sup> who falsely asserts that a tenant in possession under an agreement for a lease had consented to give it up;<sup>3</sup> who on the sale of an estate with such a title as he might have did not communicate a defect in the title when asked respecting it;<sup>4</sup> who during the treaty industriously conceals the maintaining of a wall necessary to protect the estate from a river;<sup>5</sup> who states that the sale is without reserve, and yet employs a puffer.<sup>6</sup> It matters not whether the misrepresentation be wilful or not, it is a sufficient reason for equity to refuse to act, that it would be a hardship upon the defendant.<sup>7</sup> The rule here stated would probably not be applied where the purchaser when he contracts knows the fact, knows that the statement of the vendor is a misrepresentation, unless indeed the conduct of the vendor were so fraudulent as to render him unworthy of the assistance of the court.

The cases just referred to must not be confounded with those in which the written agreements contained a false, or an ambiguous or uncertain description of the subject of the contract. If a description be precise and false, it is of the nature of a latent ambiguity, and it is apprehended parol evidence may be used not merely to show that it is false, but also any circumstances respecting it, as the knowledge the purchaser had of it. If an estate be falsely described as only one mile from a borough town,<sup>8</sup> or as being within a ring fence,<sup>9</sup> or as being subject only to a ground rent,<sup>10</sup> or as being free from increase, while it is subject to a lease for life,<sup>11</sup> or if infirm life be described as healthy,<sup>12</sup> unless it can be shown

<sup>1</sup> *Beaumont v. Dukes*, Jacob, 422.

<sup>2</sup> See 7 Ves. 218.

<sup>3</sup> *Clermont v. Tasburgh*, 1 Jac. and W. 112.

<sup>4</sup> *Early v. Garret*, 9 Barn. and Cress. 928.

<sup>5</sup> *Shirly v. Stratton*, 1 Bro. C. C. 440.

<sup>6</sup> *Meadow v. Tanner*, 5 Mad. 34.

<sup>7</sup> See 1 Mad. 81.

<sup>8</sup> *Duke of Norfolk v. Worthy*, 1 Camp. 337.

<sup>9</sup> *Dyer v. Hargrave*, 10 Ves. 505.

<sup>10</sup> *Stewart v. Allison*, 1 Mer. 26.

<sup>11</sup> 1 Younge, 195.

<sup>12</sup> *Brealey v. Collins*, 1 Younge, 317.

that the purchaser knew the real fact, he cannot be compelled to complete his contract. In some cases the purchaser may be compelled to complete with a compensation.<sup>1</sup>

But if the description be accompanied by a vague and indefinite epithet or explanation, as if meadow land be described as "uncommonly rich,"<sup>2</sup> or leasehold premises be stated to be renewable on payment of "a small fine,"<sup>3</sup> or to the description of an adowson there be added "a voidance of this preferment is likely to occur soon,"<sup>4</sup> the courts hold that the vagueness of such expressions should only serve to put a purchaser upon inquiry, and that he cannot resist a specific performance though they may have deceived him. But it is apprehended if a vendor know that a purchaser has affixed a certain and precise meaning to an ambiguous or a vague expression in the agreement, which is contrary to the fact, and he, the vendor, allows the purchaser to sign the contract under such a mistaken impression, that a court of equity would not assist the vendor; and to show the understanding of the purchaser and the knowledge of the vendor parol evidence may be used.

Thus in a case in which leaseholds were sold as renewable on payment of a small fine, and represented as nearly equal to freehold, Sir W. Grant, M. R. observed, "the representation as to the small fine is indefinite. So is the representation, that the estate is nearly equal to freehold. All these representations ought to put the party upon inquiry. Connected with certain circumstances such representations may however be fraudulent. In this case the knowledge of the vendor that a larger fine would be required is established; also his knowledge that the purchaser entertained a different idea of the fine. These are grounds for rescinding the contract if made out. This purchaser wished to ascertain the fine, and offered £150 which the vendor refused. I cannot put the purchaser in the situation in which he would have been, if the £150 had been accepted. That circumstance [the refusal of the £150.]

<sup>1</sup> See *Scott v. Hanson*, 1 Russ. and Myl. 128; 1 Younge, 300.

<sup>2</sup> *Scott v. Hanson*, 1 Russ. and Myl. 128.

<sup>3</sup> *Fenton v. Browne*, 14 Ves. 144.

<sup>4</sup> *Trower v. Newcome*, 3 Mer. 704.

ought to have put him on inquiry.”<sup>1</sup> Here it is evident Sir W. Grant received parol evidence in order to show what was the understanding of the parties as to vague and indefinite expressions in a written contract, and which were in fact of the nature of a patent ambiguity. A court of Law it is conceived would not receive parol evidence in such a case; it would apply the words of the contract to the subject of it, and it would then decide whether the actual subject was fitly described.

Again, an estate sold by auction was described in the particular as containing “by estimation 41 acres be the same more or less,” a description sufficiently indefinite, for the only contradiction to such a proposition could be, that the estate had not been estimated to contain so much. The estate in fact contained only 35 acres, and the purchaser refused to complete without an abatement, relying upon parol evidence, which proved that the auctioneer at the sale had said that he sold for 41 acres, and that if the quantity was less there should be abatement. Sir W. Grant, M. R., stated,<sup>2</sup> “as to the admissibility of the evidence, it must depend upon the purpose for which it is produced. If the defendant insists, that the evidence being received he will be entitled to have the contract performed with an abatement of the price, I think it not admissible for that purpose, as the court cannot execute in his favour a written agreement with a variation introduced by parol testimony; but if he says he was deceived by this representation, and therefore was induced by fraud to enter into the contract, and offers the evidence for the purpose of getting rid of such contract altogether, for that purpose I think it may be received; as if such a declaration was made by the auctioneer, it would undoubtedly be fraudulent and unfair in the plaintiffs to insist upon the execution of the contract, not giving the defendant the benefit of that declaration.”

In *Trower v. Newcome*,<sup>3</sup> which was a suit by a vendor to enforce performance of an agreement for purchase of an

<sup>1</sup> *Fenton v. Browne*, 14 Ves. 149, A.D. 1807.

<sup>2</sup> *Winch v. Winchester*, 1 Ves. and B. 375, A.D. 1812.

<sup>3</sup> 3 Mer. 704, A.D. 1813.

advowson, to the description of which was added "a voidance of this preferment is likely to occur soon," the defendant said he was induced to attend at the sale by this representation; that the auctioneer at the time of sale said, in explanation, "that the living would be void on the death of a person aged 82," of which the defendant took a note in writing, and that he was by such statement induced to bid, and did bid accordingly. The defendant after he had signed the agreement discovered that the incumbent was only 32, and the vendor refused to give security, that the living would be void on the death of a person aged 82. It appeared in evidence that the incumbent expected to be presented to another living on the death of its incumbent aged 82. Sir W. Grant, M. R., thought the representation made by the printed particulars so vague and indefinite that the court could not take notice of it judicially, and that its only effect ought to have been to put the defendant upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place, previous to his becoming the purchaser. That such a representation was capable of being supported by the fact, either of the incumbent being old or infirm, or by various collateral circumstances. In the case of *Scott v. Hanson*,<sup>1</sup> Sir John Leach, V. C., observed, "I agree with Sir W. Grant in the case of *Trower v. Newcome*, that a representation which is vague and indefinite is to be treated by a purchaser only as a ground for inquiry; and the doubt in that case is whether the purchaser was not justified in concluding that the representation amounted to a statement that the incumbent was 82 years of age."

In *Scott v. Hanson*,<sup>2</sup> in which a purchaser resisted a bill for a specific performance, on the ground that he was deceived by the expression "uncommonly rich meadow," Lord Chancellor Lyndhurst decided against him, because "there was no evidence to show any fraud or intentional misrepresentation on the part of the vendors. The lands were sold, not by the bankrupt, but by his assignees; and it did not appear they were apprised of the nature of the property."

There is, indeed, abundant authority in the books to show

<sup>1</sup> 1 Simons, 13.

<sup>2</sup> 1 Russ. and Myl. 128.

that a defendant in a suit for a specific performance, may avail himself of parol evidence to prove that he entered into the contract under a mistake, and that the plaintiff knew that he was deceived. This introduces us to the consideration of the doctrine of courts of equity, that parol evidence is admissible under the head of mistake;—a doctrine, which has been frequently reprobated and denied by Judges in the common law courts, because they did not rightly understand it, and which, it must be confessed, has been oftentimes imperfectly explained by its patrons in the courts of equity. Lord Eldon, alluding to an opinion expressed by Mr. Justice Buller on this subject, observed, “speaking with all the veneration and respect due to so great a judicial character, the point in which it seems to have failed is, that he thought too confidently that he understood all the doctrine of a court of equity. It cannot be said, that because the legal import of a written agreement cannot be varied by parol evidence, intended to give it another sense, therefore, in equity, when once the Court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more examinable at law; but all the doctrine of the Court as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which therefore the Court will not execute, must be struck out, if it is true, that because parol evidence should not be admitted at law, therefore it shall not be admitted in equity, upon the question, whether, admitting the agreement to be such as at law it is said to be, the party shall have a specific execution, or be left to that Court, in which it is admitted parol evidence cannot be introduced. A very small research into the cases will show general indications by Judges in Equity, that that has not been supposed to be the law of this court.<sup>1</sup> Lord Eldon, after showing that it was the opinion of Lord Chancellors Hardwicke and Thurlow, that parol evidence, which goes to prove that the words taken down in writing were contrary to the concurrent intention of all the parties, should not be rejected, but that such evidence, to avail, should be so strong and irrefragable as to be difficult to procure, says, “I agree those producing evidence of mistake or sur-

<sup>1</sup> 6 Ves. 332.

prise, either to rectify an agreement, or calling upon the court to refuse a specific performance, undertake a case of great difficulty; but it does not follow, that it is therefore incompetent to prove the actual existence of it by evidence."<sup>1</sup>

The objection which courts of law make to the admission of parol evidence, on the ground of mistake, may be stated in the words of C. B. Eyre: "Writing stands higher in the scale than mere parol testimony; and when treaties are reduced into writing, such writing is taken to express the ultimate sense of the parties and is to speak for itself. Indeed, nothing is so familiar as this idea. At *Nisi Prius*, when an agreement is spoken of, the first question always asked is, whether the agreement is in writing; if so there is an end of all parol evidence; for when parties express their meaning with solemnity, this is very proper to be taken as their final sense of the agreement. In the case of a contract respecting land, this general idea receives weight, from the circumstance that you cannot contract at all on that subject but in writing; and this therefore is a further reason for rejecting the parol evidence. In this way only is the statute of frauds material, for the foundation and bottom of the objection is in the general rules of evidence. I take this rule to apply in every case where the question is, what is the agreement? and this rule applies no further than this precise question; for as often as the question is, what were the collateral circumstances attending the agreement?—so often may such collateral circumstances be proved by parol evidence: there is no law which says such collateral circumstances may not be so proved. If any of these collateral circumstances are reduced into writing, then the same rule applies to them as to the original agreement; but if not, both at law and in equity such collateral circumstances may be proved by parol. If duress be pleaded, or a false reading of the deed, you may avoid the deed at law by parol evidence; but then these facts are collateral to the import of the instrument, they are dehors to the agreement; they do not vary or alter it; yet, admitting the truth of the agreement, they tend to show that it ought not to affect the party. These are two instances at law; there are many more in equity, on fraud and

<sup>1</sup> 6 Ves. 338.



circumvention and many other grounds, and you must necessarily admit parol evidence on all such grounds, which are clearly collateral to the agreement itself. Now to apply this to the present case: what is the true agreement? The defendants say, that it is only an agreement for the security of money. This is not collateral to, but a part of the agreement itself. It might have been received if you had attempted by it only to raise a trust; but here the written agreement manifestly imports one thing, and you would by parol evidence show that it imports no such thing."<sup>1</sup>

But the doctrine of equity on this subject when fully stated does not seem open to the reproach cast upon it. If a plaintiff in a suit for a specific performance gives evidence to rectify the written agreement, and seeks to enforce the contract as varied by the parol evidence, the Court will not decree specific performance if the defendant merely deny the result of the evidence in his answer. This is proved by many cases and dicta,<sup>2</sup> and it shows that equity does not contravene the statute of frauds by charging a person upon an agreement not in writing nor admitted. A party resisting a specific performance is allowed to produce parol evidence, to show that the written agreement does not correctly express, or does not contain the whole of the contract as it was understood by both parties *at the time*.<sup>3</sup> If the evidence of the defendant merely proves that *he* misunderstood the words written, and does not show that the plaintiff was aware he misunderstood them, the evidence, though admitted, would, generally speaking, be of no avail, and the plaintiff might demand a specific performance: but even in such a case, as Lord Eldon observed, the Court has a discretion not to give the specific performance, but to leave the party to law.<sup>4</sup> If the defendant succeed in proving that the plaintiff knew he, the defendant, acted under a mistake, he shows that the plaintiff has been guilty of a species of fraud; he shows that the plaintiff is endeavouring to compel him to do what he, the plaintiff, knows he never in fact contracted to do.

<sup>1</sup> Verba Lord C. B. Eyre in *Davis v. Symonds*, 1 Cox, 402.

<sup>2</sup> See *Marquis of Townshend v. Stangroom*, 6 Ves. 328.

<sup>3</sup> See *Price v. Dyer*, 17 Ves. 356. *Garrard v. Grinling*, 2 Swaust. 244.

<sup>4</sup> 13 Ves. 427.

In *Calverley v. Williams*,<sup>1</sup> the property contracted to be sold was described as lands in the possession of Groombridge, at the rent of 65*l.*, and then a particular description of the lands was given in a schedule. Calverley, the purchaser, accepted a surrender of the lands, which were copyhold, according to the schedule, but afterwards discovered that there was a parcel of land called Cuddington included in the demise to Groombridge, at the rent of 65*l.*, not in the schedule. Calverley sought to compel a surrender of Cuddington, which was resisted by Williams, the vendor; and Lord Thurlow, satisfied by parol evidence that *neither party* supposed Cuddington to be included in the contract, dismissed the bill.

We have already stated the facts of the case of the Marquis of Townshend v. Stangroom, to which we refer the reader. Stangroom filed a bill against the Marquis<sup>2</sup> for a lease of all the land he occupied at the time of the agreement. Lord Eldon stated the question to be, "whether if Stangroom really understood he was to have the whole of his old farm, he shall have a specific performance, if the other party could not so understand it."<sup>2</sup> His Lordship then adverted to the words "more or less," and thought they could not be made use of to add the 24*a.* "It would be very singular upon those words to add 24*a.* which he (Stangroom) knew were already demised, as far as parol could demise them, to Garret. It is almost impossible that he could mean to include them. Therefore, upon the head of the true meaning of the agreement, I think the parol evidence may be introduced; but, without determining that, the evidence is so complete to show, *Spearing did not mean it at the time of the agreement, and that Stangroom must have known that he could not mean it, that he is therefore to be left to law.*"

In this suit, *Stangroom v. Townshend*, Lord Eldon thought that the parol evidence might be introduced to explain the latent ambiguity in the agreement, and to get at its "true meaning." But, without determining that, his Lordship admitted the evidence on the part of the Marquis as a defence against the specific performance sought by Stangroom, and

<sup>1</sup> 1 Ves. jun. 209.

<sup>2</sup> *Stangroom v. Marquis of Townshend*, 6 Ves. 328.

held, that as it proved that the agent of the Marquis signed the agreement under a misunderstanding, which mistake Stangroom must have been aware of, that therefore he, Stangroom, should not be allowed to benefit by such mistake.

In the two last cited cases, *Calverley v. Williams*, and *Stangroom v. Marquis of Townshend*, the parol evidence seems to us to have been clearly admissible, on the ground that there was in the written agreements a latent ambiguity; but they show strongly when and why courts of equity admit a party to defend himself, by producing parol evidence, though it may in fact vary and alter the terms of a written contract.

In *Clarke v. Grant*,<sup>1</sup> Sir Wm. Grant, M. R. stated, "The main ground of the defence here made is a parol agreement said to have been entered into at the same time with the written agreement, and made previously to its being signed. On this two questions arise. First, as to the competency of the evidence; and, secondly, as to its sufficiency. I am of opinion, that it is competent for the defendant to offer this evidence. The agreement was, that the defendant was to have a lease for sixty years of an acre of ground called Bloody Wort, which includes a wharf, and to which was to be super-added half an acre, part of a close then held by a Mrs. Jackson, and which half an acre is defined in the written memorandum of agreement. It is stated by the defendant, that before he signed the written agreement, he stipulated that he should be at liberty to propose alterations as to the precise spot to be taken from Mrs. Jackson's close, to be added to the Bloody Wort; and that this was expressly assented to by the vendor. If the evidence be admissible, it appears, that this written agreement was only signed in consequence of the promise of the vendor to consent to such alterations with regard to the spot as would be for the convenience of the defendant: so that but for this promise there would probably never have been any agreement at all. It would then be against equity, and a fraud on the defendant, to insist upon his performance of an agreement which he only signed on the faith of an alteration being made in one of its terms. It has been ruled,

<sup>1</sup> 14 Ves. 519. See *Ramsbottom v. Gosden*, 1 Ves. & B. 165 S. P. *Davis v. Symonds*, 1 Cox, 402, S. P.

that it is not open to a plaintiff to supply or correct a term of a written agreement by parol; but it has never been determined that a defendant cannot set up a parol engagement, in opposition to a party who, having entered into it, seeks to have a written agreement specifically performed, independently of it. The statute of frauds has not altered the situation of a defendant, against whom a specific performance is prayed."

In this case the parol evidence expressly contradicted the written agreement, which exactly defined the situation of the land to be added; whereas the evidence proved that it was the understanding of both parties that the defendant should be at liberty to take it where he pleased. It is, indeed, clearly established, that a defendant in a suit for specific performance may avail himself of any parol evidence which goes to prove that he, with the knowledge of the plaintiff, had, at the time of signing the agreement, a different understanding respecting the contract than the written terms import. But Sir Edward Sugden, citing the case of *Omerod*<sup>1</sup> v. *Hardman*, decided by Mr. Justice Chambre and Mr. Baron Graham, states, "if parties enter into an agreement, which is correctly reduced into writing, and at the same time add a term by parol, equity cannot look out of the agreement, although the person insisting upon the parol agreement is a defendant, and sets it up as a bar to the aid of the Court in favour of the plaintiff."<sup>2</sup> This dictum involves what is almost a contradiction in terms, for how can an agreement be said to be "correctly reduced into writing," which, at the time it is signed, contains not all the terms agreed upon? And where, it may be asked, is the equity to allow a plaintiff the benefit of an extraordinary remedy, when he knows that he is seeking to enforce what the defendant never contracted to perform alone? But this was not the main point in *Omerod* v. *Hardman*; and it is clear that the opinion of Mr. Justice Chambre, a Judge truly learned, but not conversant with the doctrines of equity, is directly contrary to the decision of Sir Wm. Grant in *Clarke* v. *Grant*:<sup>3</sup> and it is, indeed, contradicted by a case cited by Sir Edward himself, in the preceding page. A suit was instituted to enforce the specific performance of an agreement to

<sup>1</sup> 5 Ves. 722.

<sup>2</sup> V. & P. 127.

<sup>3</sup> 14 Ves. 519.

accept a lease. The defendant set up a parol agreement, by which he was to have liberty to grub bushes, and the bill was dismissed.<sup>1</sup> So, too, in a case where a plaintiff sought the specific performance of a written agreement to grant a lease, the defendant resisted, because the agreement did not contain a covenant, which was one of the terms of the contract, and the bill was dismissed.<sup>2</sup> Sir Thomas Plumer, M. R. observed, "On reading the pleadings and the evidence, I am of opinion, that the plaintiff has not established a case for the specific performance which he prays. It is incumbent on the plaintiff, in such a suit, to satisfy the Court that he is entitled to specific performance of the very agreement stated in the bill; insisting on a written contract, the question must be, is that written contract conformable to the actual contract? It is certainly competent to the defendant to show, that by fraud or mistake, or otherwise, the written contract and the actual contract differ; and it is established by the evidence on the part of the plaintiff that such is the fact of the case."

In *Clowes v. Higginson*<sup>3</sup>, which arose out of a sale by auction, the particular was ambiguous (a patent ambiguity) whether the purchaser should pay for the timber in addition or not. The purchaser filed a bill to enforce a specific performance, insisting on the construction of the articles which included the timber in the sum bid. The vendor resisted this, and stated that the auctioneer at the sale, in answer to a question whether the timber was to be taken at a valuation, declared publicly, that the timber was to be valued separately and taken by the purchaser at such valuation. This was proved by the evidence of the auctioneer and his clerk; opposed by that of the agents of the plaintiff, that they did not recollect any such conversation.<sup>4</sup> Sir Thomas Plumer, V. C. decided that parol evidence of the auctioneer's declaration was not admissible on behalf of the defendant, the vendor. Sir Edward Sugden observes on this decision,—“it was not, however, necessary to decide the point; and it may, perhaps, deserve re-consideration whether the evidence might not be deemed admissible in equity as a *defence*, simply on the ground that the plaintiff, who ought to come into equity with

<sup>1</sup> *Hosier v. Read*, 9 Mod. 86.    <sup>2</sup> *Garrard v. Grinling*, 2 Swanst. 244.

<sup>3</sup> 1 Ves. & B. 524.

<sup>4</sup> See statement, 15 Ves. 518.

clean hands, sought to commit a fraud in evading to pay for the timber, although the auctioneer declared that it was to be paid for."<sup>1</sup> It seems to us clear that the evidence was admissible, for the object of it was to show that the defendant, at the time of the contract, understood that the timber was not included in the sum bid, and that the plaintiff knew that such was his understanding; this evidence therefore went to show what was the real contract between the parties, to ascertain which we have seen equity always allows a defendant to resort to parol proof.<sup>2</sup>

It should be observed that a party cannot resist a specific performance because the plaintiff refuses to admit and perform certain variations from the written instrument agreed to verbally and without any consideration subsequently to the signing of the contract.<sup>3</sup> For him the writing is assumed to contain a complete and correct statement of the contract between the parties at the time of the signing; and the signature of the defendant was not induced by any understanding on his part, or any representation on the part of the plaintiff contrary to their written words; nor could it avail the defendant to show that the plaintiff had refused to perform a subsequent parol promise given without any consideration.

But suppose that parties enter into a valid agreement in writing, and that they afterwards, with relation to the same subject matter, make a parol agreement which alters or varies or extends the written agreement, if either party gives any consideration for the parol alteration, a specific performance of the written agreement alone could not be enforced against him; for it would be fraud on the part of the plaintiff to attempt thus to deprive the defendant of the benefit of the parol alteration, for which, on the supposition he, the defendant, had already paid, and to compel him to file a bill for the specific performance of the parol agreement on the ground of part performance.

Parties entered into a written agreement for the lease of a house which was to be repaired by the landlord; it was soon discovered that the house was not worth repairing, and it was agreed by parol that the house should be taken down and

<sup>1</sup> V. & P. 125.

<sup>2</sup> See *Winch v. Winchester*, 1 Ves. & B. 375.

<sup>3</sup> *Price v. Dyer*, 17 Ves. 356.

rebuilt by the landlord, and that the rent named in the written agreement, 32*l.*, should be increased to 40*l.* When the house was finished the tenant filed a bill for a specific performance of the written agreement alone, but it was dismissed by Sir John Strange, M. R. who allowed parol evidence to be read with respect to the rebuilding instead of the repairing of the house and the increase of rent.<sup>1</sup> Perhaps the simple answer to the plaintiff's case would have been: the subject matter of the written agreement no longer exists; it was destroyed with your own consent; the defendant contracted to let you a repaired house, you cannot contend that it is a contract to let you a new house.

We come now to the question whether a defendant can resist a specific performance on the ground that the plaintiff has by parol waived or abandoned the previous written agreement. On this point we beg to refer our readers to an article in our fifth volume, p. 375, and we shall here merely make a few extracts from the leading cases to render our present disquisition complete.

Mohun contracted in writing to sell an estate to Backhouse; subsequently one Crosby applied to Mohun to purchase the same estate, and Backhouse was sent for, who said he would not go to law, but would write to Mohun on the subject; a letter was sent by him, but it was not produced nor read in evidence. Backhouse filed a bill for a specific performance, which was resisted on the ground that the plaintiff had waived his contract.<sup>2</sup> Lord Hardwicke, C. "The defence insisted on is of a tender nature, and to be received by a Court of Equity with great caution; for even the agreement to depart from a former agreement, is as much an agreement concerning lands as the first; and therefore taking it originally and abstracted from circumstances, ought as much to be in writing, and is equally within the Statute of Frauds; but notwithstanding that, if it clearly appears that a plaintiff in a Court of Equity insisting on such an agreement contained in letters, has, by acts done, waived it, and thereby drawn in another to purchase and complete his purchase, in such case

<sup>1</sup> Legal v. Miller, 2 Ves. sen. 299.

<sup>2</sup> 3 Swanst. 434, note. Backhouse v. Mohun, Crosby and Others, 10 Geo. 2, S. C. 2 Eq. Cas. Abr. 32.

it would be a good defence to be insisted on by the second purchaser, showing that he proceeded *bonâ fide*, and consequently would rebut any equity of the first purchaser." His Lordship then adverted to the evidence and thought it not sufficient. Considering the occasion on which the parol evidence was offered, the reference to the Statute of Frauds seems not quite correct; but his Lordship stated the true ground on which such evidence might in such a case be received, "*to rebut an equity.*"

In *Davis v. Symonds*,<sup>1</sup> Chief Baron Eyre said, "there is another point made on the part of the defendants; they say that though the agreement did take place, yet that it was afterwards waived, and that such waiver may be by parol; *and it certainly may be so*: the waiver is in its own nature subsequent to, and necessarily collateral to, the agreement, and therefore can never bear any relation to the rule of evidence above stated. [The rule that a written contract cannot be varied by a contemporaneous parol agreement.] There might, indeed, have been another rule, that a written instrument shall not be waived by parol, but, in fact, Courts of Equity do not consider themselves as bound by any such rule, and it is now clear that a written agreement may be waived so." His Lordship, however, did not think the evidence amounted to such a waiver.

Sir William Grant, M. R. in *Price v. Dyer*,<sup>2</sup> observed, "It is said that the agreement was waived; and that a written agreement may be so far waived by parol that the Court will refuse the interposition of its equitable jurisdiction to enforce it. Not conceiving that there was in this case any waiver within the meaning of the dicta or decisions upon this subject, it is not necessary for me to give a precise opinion upon the point, but as at present advised, I incline to think that upon the doctrine of this Court such would be the effect of a parol waiver clearly and satisfactorily proved; but here was no such

<sup>1</sup> 1 Cox, 402.

<sup>2</sup> 17 Ves. 363. In *Coles v. Trecothick*, 9 Ves. 250, Lord Eldon observed, that an agreement in writing may clearly be dissolved by parol. What Lord Thurlow said in *Jordan v. Sawkins*, 1 Ves. jun. 404, was merely that a person who had contracted in writing for a lease, may, where he seeks a specific performance, waive or give up part of the terms mentioned in the agreement.



waiver. The waiver spoken of in the cases is an entire abandonment and dissolution of the contract; restoring the parties to their former situation.

"Sir Edward Sugden writes "whether an absolute parol discharge of a written agreement not followed by any other agreement upon which the parties have acted, can be set up even as a defence in equity seems questionable.<sup>1</sup>" Lord Lyndhurst, M. R. in a late case declared his opinion that it may; and whether the waived agreement is followed by another contract or not seems immaterial with respect to the question, is the plaintiff acting honourably and in good faith? "On the part of the defendant, it was contended that the agreement of the 5th March was altogether abandoned; and it was said, and authorities were cited to show, that parol waiver and abandonment might be set up as a defence to a bill for specific performance. Unquestionably, waiver, even by parol, would be a sufficient answer to the plaintiff's claim. But it has been laid down in all the cases, that such a defence must be established with the greatest clearness and precision; and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into."<sup>2</sup>

The results of our inquiry may be summed up in a few words. 1. Parol evidence is not admissible on behalf of a plaintiff in a suit for a specific performance to show that the written agreement does not contain the real contract between the parties; the court can only decree the execution of an agreement which is in writing and signed by the party charged; it cannot add to, restrict, or alter the written terms.

2. Parol evidence is admissible on behalf of a plaintiff to explain a latent ambiguity in the written agreement, but such evidence will not avail, unless it be most cogent and convincing, or, if it details the acts and declarations of the party charged and he denies it on oath.

<sup>1</sup> Sir Edward observes (V. & P. 132) "An agreement in writing concerning land, may be discharged, although it cannot be varied by parol." This is not very accurately expressed. A parol discharge may be used as a defence in a suit for a specific performance, but so may a parol variation also.

<sup>2</sup> Verba Lord Lyndhurst in *Robinson v. Page*, 3 Russ. 119, A. D. 1826.

3. Parol evidence is admissible on behalf of a defendant in a suit for a specific performance, to show fraud, concealment; or any species of unfair dealing or dishonourable conduct on the part of the plaintiff during the contract, or, in fact, any matter or circumstance dehors the contract and prior to the signing of the written agreement, by reason of which either the plaintiff does not deserve, or it would be a hardship on the defendant to afford, the interference of the Court.

4. Parol evidence is admissible on behalf of a defendant to show that the written agreement does not contain the whole or does not correctly express the real contract between the parties.

5. Parol evidence is admissible on behalf of a defendant to show, that, subsequently to the signing of the written agreement, a verbal contract affecting or relating to the same subject was entered into, which had been in part performed or acted upon.

6. Parol evidence is admissible on behalf of a defendant to show, that, since the signing of the written agreement, it has been waived or abandoned by the plaintiff.

W.

ART III.—LIVES OF LORD CHANCELLOR ELLESMERE AND  
SIR J. E. WILMOT.

*A Compilation of various Authentic Evidences and Historical Authorities, tending to illustrate the Life and Character of Thomas Egerton, Lord Ellesmere, Viscount Brackley, Lord High Chancellor of England, &c. and the Nature of the Times in which he was Lord Keeper, and Lord High Chancellor; by Francis Henry Egerton, &c. Large Folio. Paris, 1812. Privately printed.*

*Memoirs of the Life of the Right Honourable Sir John Eardley Wilmot, Knt. late Lord Chief Justice of the Court of Common Pleas, and one of His Majesty's Most Honourable Privy Council; with some Original Letters. By John Wilmot, Esq. Second edition with additions. 8vo. London, 1811.*

THE works of which we here propose to give some account treat of two very different periods of legal history; the subject

of the first having flourished under Elizabeth and James, and of the last during the Reigns of the Second and Third Georges. If it be necessary, therefore, to seek for some point of coincidence, in order to justify this juxtaposition of them, we have only to remark that both are specimens of legal biography, and both, as respects the date of their publication,<sup>1</sup> nearly contemporary. We may add that both are written by relatives of the parties; and though this fact certainly cannot be supposed to establish any identity or even similarity in the manner and style of the works, especially as the biographer in one case is the son, and in the other a much more remote descendant, still it has given both authors a greater command of materials, and has doubtless caused them to set about their respective tasks with more earnestness of purpose than they might have brought to it, had the fact been otherwise.

That this has been the case with regard to the Honourable and Reverend Francis Egerton (who, we understand, is or was a prebendary of Durham, and Rector of Whitechurch in Shropshire) will, we think, sufficiently appear by a history of the attempts he has made to bring his work nearer towards perfection. The substance of it, or as it may be termed the first edition, was inserted in the fifth volume of the *New Biographia Britannica*, edited by Dr. Kippis. In the second and augmented edition of the succeeding volumes, edited by Dr. Gregory, we find the following notice. "The life of the Lord Chancellor Egerton was given in our fifth volume; but so little to the satisfaction of the gentleman who favoured us with it, that, at his solicitation, we have consented to an amended copy of that article, or more properly speaking, of an entire new life of that great man. For whatever awkwardness our readers may find in this circumstance, we must rest our apology on the importance of the information which the author has been at the pains of collecting upon this occasion." Circumstances however occurred, the author tells us, to delay the publication, and the amended copy eventually assumed its present form of a tall though slender folio,

<sup>1</sup> The first edition of Sir T. Wilmot's Life was published in the same volume with a Collection of his opinions and judgments, 4to. 1802.

luxuriant in all the splendour of the elder Didot's types, and confined to the perusal of a select few by being printed for private circulation. Now all this preparation, and care, and expense, one would hardly expect to be bestowed, except on a work that would be likely to make the bestower some return in point of literary reputation; which, however, we much fear the folio before us has very little chance of doing. In the first place, the plan of the book is in our judgment an exceedingly bad one, it being executed, as the original *Biographia Britannica* professes to be, "After the manner of Bayle," (alas! with how little of his spirit!) that is, formed of a meagre streamlet of text, swamped and flooded over, and almost covered quite out of sight, by hugh muddy torrents of notes, pouring under and over and across, and with and against the current, and in short in every possible direction. If these notes had any real connexion with the matter in hand, there might be some excuse for multiplying them after such a fashion; but when we find page after page filled with letters in French from Queen Elizabeth to Henry the IV., despatches to and from French and Dutch Ambassadors, official instructions and reports about wars and treaties, chiefly in French, and indeed about every thing what Lord Ellesmere had or could have any concern with; all we can conclude is, that the Honourable and Reverend Francis Henry Egerton has a fancy for transcribing and for seeing his transcriptions re-produced in print after Didot's best fashion. This fancy he has no doubt a very good right to indulge; the rather that we suspect he has had to pay roundly for the indulgence. We quarrel with no man's hobby, and our author may ride his as far and as fast as he likes; only we must be allowed to excuse ourselves from getting up behind him.

In respect of style, Mr. Egerton evidently makes no pretensions; and indeed he has so disclaimed all intention of resting his fame upon his text, that he has seldom scrupled to borrow almost the very words of the short Memoir (we know not by what author) inserted in the original *Biographia Britannica*, which was published in 1750. We will give a specimen of this in parallel-columns, taken from the opening of the work:

"He was born in Cheshire, about the year 1540, and admitted commoner of Brazen-nose College in Oxford, about 1556, in the seventeenth year of his age. Having continued there three years, and laid a good foundation of learning, he removed to Lincoln's Inn, and applied himself with such success to the study of the law, that he became a noted counsellor. Being taken notice of by that good judge of merit, Queen Elizabeth, she constituted him, on the 28th of June, 1581, her Solicitor-General. The year following he was elected Lent-Reader of Lincoln's Inn, a place conferred on none but persons of great learning. He became also one of the governors of that society, and continued so for twelve years successively. On the 2d of June, 1592, he was made Attorney-General, and knighted soon after, &c."—*Biog. Brit.* 1750.

"He was born in Cheshire in the year 1540. In 1556, he was admitted a commoner of Brazen-nose College in Oxford, where he continued about three years; and having laid a good foundation of classical and logical learning, he removed from thence to Lincoln's Inn, and applied himself with such success to the study of the law, that he soon became a noted and eminent counsellor. The superior abilities he displayed in the line of his profession, and his distinguished eminence at the bar, did not escape the notice of Queen Elizabeth, whose discerning judgment selected the ablest men in every department of government to be the instrument of her happy and auspicious reign. On the 28th of June, 1581, she appointed him her Solicitor-General; and the year after, he was chosen Lent Reader of the society of Lincoln's Inn, an office which was conferred on none but persons distinguished for superior learning and abilities. He was also made one of the governors of that society, and continued so for twelve years successively. His conduct and proficiency in the law occasioned his being promoted, on the 2d of June, 1592, to the office of Attorney-General, and he was knighted soon after, &c."—*Egerton*.

We have no intention of going at length into the details of Lord Chancellor Ellesmere's Life. How he attained to this dignity, and how he became it, may be seen in the *Biographia Britannica*, or may be gathered more fully from

the numerous authorities that are there quoted. Of his last illness and death we have already, in a former volume of this Magazine, extracted an account by his contemporary Bishop Hacket, who has more than once made honourable mention of him in the course of the same work, the life of Archbishop Williams. All we shall here add, is a sample of the judgment delivered upon his character by Hacket's rival in quaintness and oddity, honest Thomas Fuller, the author of the *Worthies of England*, after which we shall endeavour to find one or two readable passages to extract from Mr. Egerton's book, and so take our leave of it.

"Olaus Magnus," quoth Fuller, "reporteth that the Emperour of Muscovia, at the audience of embassadours, sendeth for the gravest and seemliest men in Musco and the vicinage, whom he apparelleth in rich vests; and, placing them in his presence, pretendeth to forraigners, that these are of his privy council, who cannot but be much affected with so many reverend aspects. But surely all Christendome afforded not a person which carried more gravity in his countenance and behaviour than Sir Thomas Egerton; inso-much that many have gone to the Chancery on purpose only to see his venerable garb (*happy they who had no other business!*) and were highly pleased at so acceptable a spectacle. Yet was his outward case nothing in comparison with his inward abilities, quick wit, solid judgment, ready utterance. I confess Master Camden saith he entered his office *magna expectatione et integritatis opinione*, with a great expectation and opinion of integrity. But no doubt had he revised his work in a second edition, he would have afforded him a full-faced commendation, when this Lord had turned his expectation into performance."

Our first specimen shall be an anecdote which we have heard related of Noy, and we know not whom besides, but which Mr. Egerton puts down to the account of his ancestor, on the faith, as he tells us, of a current tradition. As we suspect the tradition has not furnished the particulars very minutely, we think it would have been better to represent the chief actor in the story as a counsel engaged in the cause, and not as *amicus curiæ*. However, our readers shall judge for themselves.

"He happened to be in court when a cause was trying, in which it appeared that three graziers had vested a joint deposit of a sum of money in the custody of a woman who lived in Smithfield, upon the express condition that she was to account for it upon their coming together to demand it. One of the graziers, having persuaded her that he was commissioned to receive the money by his two partners, who were in the neighbourhood bargaining for some oxen, and only waiting for the money to conclude the purchase, prevailed upon her to entrust him with it, and he immediately absconded. The two other partners commenced a suit against the woman to recover their money. The cause was brought on, and nothing now appeared to remain but that a verdict should be given in favour of the plaintiffs, when Mr. Egerton stepped forward and begged leave to speak as *amicus curiæ*.

Upon obtaining permission, he took care to establish the conditions upon which the defendant was entrusted with the money. These being readily allowed to be such as above stated, 'Then,' said he, 'the defendant is ready to comply with the agreement. It is only the plaintiffs who can deservedly be charged with attempting to break it. Two of them have brought a suit against this woman, to oblige her to pay them a sum of money, which by the agreement she was to pay to those two and to the remaining partner coming together to demand it. Where is he? Why does not he appear? Why do not the plaintiffs bring their partner along with them? When they do this, and fulfil the agreement on their part, she is ready to come up to the full extent of it on hers; till then, I apprehend that she is, by law, to remain in quiet possession.'

Another anecdote, founded on the same authority, namely, tradition :

"There is extant a traditional anecdote that Queen Elizabeth happening to be in court while Mr. Egerton was pleading in a cause against the crown, her majesty exclaimed, 'In my troth he shall never plead against me again;' and caused him to be made of her Counsel, afterwards Solicitor General, &c."

In the month of August 1602, when Sir Thomas Egerton was Lord Keeper, he enjoyed the honor of a visit from her Majesty at his place of Harville or Harefield. How the

royal party was entertained upon the occasion, there has been no Master Richard Laleham to commemorate; which is the more to be regretted, since the wetness of the weather confined them to the house during the whole of their stay, and there can be little doubt that the host's ingenuity was severely (we much question whether successfully) put to the task in contriving expedients to kill the time. One specimen, however, of his gallant devices, being a farewell compliment delivered to the Queen at her departure, is preserved in the work before us. A female figure, attired in deep mourning, and having altogether the appearance of a very distressed lady, presented herself before her majesty; and announcing herself (to prevent mistakes) as an impersonation of the place of Harefield, recited with becoming pathos of tones the following oration.

"Sweete Majestie,—Be pleased to looke upon a poore widdowe, mourning before your Grace. I ame this place, which at your coming was full of joye, but nowe, at your departure, am as full of sorrowe; as I was then, for my comforte, accompanied with the present cheerful tyme, but nowe he must depart with yow, and, blessed as he is, must ever flye before you. But, alas! I have no wings, as Tyme hath; my heaviness is such as I must staye, still amazed to see so greate happinesse to some, be lefte me. O that I could remove with yow, as other circumstances can! Tyme can goe with yow; persons can goe with yow; they can move like heaven; but I, like dull earthe, as I am indeed, must staye unmoveable. I could wishe myselfe, like the enchanted castle of love, to hould yow here for ever, but your vertues would dissolve all my enchantments. Then what remedie? As it is against the nature of an angell to be circumscribed in place, so it is against the nature of place to have the motien of an angell: I must staye, forsaken and desolate; you may goe, with majestie, joye, and glorie. My onely suite before you goe is, that you will pardon the close imprisonment which you have suffered ever since your comming; imputing it not to me, but to St. Swithen, whoe of late hath raised soe many stormes, as I was faine to provide this anchor for you [presenting an anchor jewell to the Queen] when I understoode you would put into this creeke; but nowe, since I perceave the harbour is too little for yow, and that yow will hoiste saile,



and begon, I beseeche yow take this anchor with yow ; and I pray to him that made both tyme and place, that in all places wherever yow shall arrive, you may anchor as safely as yow doe, and ever shall doe, in the harts of my owners."

At this period of Chancellor Ellesmere's life, the work before us closes ; omitting, therefore, what may be considered one of the most important incidents in it, and one respecting which the compiler might have indulged to the full his mania for collecting copious extracts—we mean the dispute concerning the Jurisdiction of the Court of Chancery, wherein Sir Edward Coke played so prominent a part. However, we cannot in conscience take upon ourselves to say that we have suffered any severe disappointment in consequence of this abrupt termination of the labours of Mr. Egerton's scissors.

Mr. Wilmot, to whom we now turn, has wielded another instrument, the pen ; and has handled it well. The style of his memoir is familiar and without any pretension, but for that very reason best fitted, in our judgment, to the subject ; and upon the whole, the impression produced by his book is rather a feeling of regret that it is so brief, than of exultation that one has got to the end of it. Let any one consider with himself how seldom he has felt this particular sort of disappointment on closing a volume, and we think he will freely admit that this avowal of ours is of itself no small eulogium. Having, therefore, thus freely expressed it, we have the less compunction in saying that we consider the original letters of Chief Justice Wilmot to be by far the most valuable part of the work ; and from these, accordingly, we shall make such extracts as our limits will admit. The following passages, written at different times between the years 1764 and 1771 to one of his sons, who intended to make the law his profession, we strongly recommend to the attention of all those who entertain a similar design. At the earliest of these dates Sir John Wilmot was a Puisne Judge of the King's Bench, which appointment he received in February, 1755. He was afterwards made Chief Justice of the Common Pleas, which station he was promoted to in August 1766, and resigned on account of ill health in December 1770.

“Your eldest brother has chosen to go to the East Indies, and is now learning French, writing, and merchants’ accounts, in order to qualify himself for the East India Company’s service; and as you seem to give the law a preference, an intimacy with all classical knowledge, and more particularly with the Greek and Roman orators, is an essential capital point, and to be cultivated with the greatest industry and application. Above all things, attend to the subject matter of their orations, and to their modes of thinking upon and treating their subjects; and beside the choice and elegance of their diction, you will find every thing which can be said or thought of upon the subject, gathered together and urged with such resistless force, as must have amazed and transported their audience; but remember, you are to speak neither in Latin nor Greek, and that language is the vehicle of sense; and therefore, use yourself to write and speak your own language correctly; and I can advise you to nothing so likely to improve you in the most material qualification for a lawyer, as translating Greek and Latin orations into English. Your mind will be thus impregnated with their thoughts, spirit, and fire, and you will find yourself surprisingly improved every day in speaking and writing your own language.”

“If you should discover in yourself any sentiment in favour of a military life, the course of your studies for that profession can be no where more successfully carried on than where you are<sup>1</sup> but in the ‘legal’ path, it may admit of doubt, whether too much foreign language may not prevent that fluency in your own, which contributes very materially to the formation of the forensic speaker here; for though sense, study, and application may make you a very good lawyer and give you knowledge, yet it never shines at the bar, but through the medium and vehicle of a great command and choice of words to adorn and embroider it.”

“Logic is certainly dry and unentertaining, but stretch all the nerves and sinews of your mind to attain it; for it is of infinite use in setting a keen edge upon the understanding; and besides, it gives an eagle eye in detecting false reasoning

<sup>1</sup> Then at a foreign academy.

and sophistry. I never knew an able logician, who did not acknowledge and feel the utility of it in forensic practice: and if you wish to figure in a legal profession, you must travel through many dry, unpleasing countries, where nothing can support you in the journey but catching a glimpse, now and then, of the terrestrial paradise which is at the end of it; by which terrestrial paradise, I mean a state of independence, and a capacity of living as you like to do, without deviating from the paths of honour and virtue, or courting either fools or knaves for a livelihood: and I hope it will be written upon the tablets of your heart, in characters not to be effaced by ambition, avarice, or pleasure: that the only sure and certain happiness to be found on this side of the grave, is a consciousness of your own rectitude. All peace and homefelt joy is the gift of virtue, and there is no applause in this world worth having, unless it is crowned with your own."

"You know my sentiments on the life to be led at the Temple for the attainment of legal knowledge. Three years severe study lays in a competent stock to work upon, and practice alone will fashion and instruct you in the management of it; for though gigantic parts will give great superiority, yet I have never known nor heard of great excellence in the knowledge of the common law, without great pains taken at some time or other by the possessor of it. The law is a mistress not to be won by flight, transient, 'passagere' visits, but by a steady, unremitting pursuit, and an undaunted perseverance in the attack, against all denials: ambition and necessity are the great supports of it; but if you cannot get one of the first prizes, '*honestum est in secundis tertiisve consistere*,' and the powers of your mind are certainly equal to every part of the study, nay, even to the subtleties of it; but you must not expect that refinements, not drawn from the natural reason of man, should remain imprinted on your mind in the same large, legible characters, as the precepts of morality. Nobody expects that a young man, who has not been in some precedent practice and habits, should '*emane*' a lawyer in the first instance. Great allowances are made, by the bar and the bench, and an audience; and even ignorance escapes, under the veil of a presumed modesty, which good nature throws over every man (that is not a coxcomb) in his novitiate.

You complain of an ‘*inedia verborum*,’ the best receipt for that complaint is reading English books of the most classical kind, and a total abstinence from all other languages, except when you turn them into English, or rather paraphrase them. I have often known too much Latin and Greek, or French, almost extinguish the ‘*flumen*’ and ‘*copia dicendi*’ in English; but habituating yourself to correct modes of thinking; will generally produce clear and luminous modes of expression: if the spring be clear, the stream will be so too, if other languages do not check or disturb it, or if too great an anxiety for a choice diction do not interrupt it. Put-case clubs, and seizing all opportunities of speaking upon all subjects you understand, will unlock the storehouse of words, coin your ideas, and give that currency and profluence which you at present want. The advice given to St. Paul should be ever in your thoughts:

‘*Μὴ φοβῆ ἀλλά λαλεῖ, καὶ μὴ σιωπῆσης.*’

“There are two things you must inviolably adhere to in any plan of study: 1st. Not going out in a morning, except from inevitable necessity. 2dly. Not keeping your chamber door open, which is worse than going out, because it exposes you to the idleness and impertinence of all who do, and does not even leave you the choice of your own company. Six hours in the morning appropriated to law, with a voluntary played upon it by me in an evening, or before dinner, for one hour, would impregnate your mind so thoroughly, that it would keep the odour as long as you chose to practise it, either isoterically or exoterically; for I know from experience, that the doses I took of Lord Coke, about forty years ago, operate to this day.

“The song in *Comus*, to *Virtue*, is equally applicable to law:

‘Who wins her height must patient climb,  
The steps are peril, toil and care.’”

Our next and last extract from the letters shall be his own account of a severe accident that befell, while he was presiding as Judge at the Worcester Spring Assises of 1757. It was written immediately after the event, being dated four o'clock in the afternoon of the day on which it happened.

*“ Worcester, 15 March, 1757,*

*“ Four in the afternoon.*

“ I send this by express, on purpose to prevent your being frightened in consequence of a most terrible accident at this place. Between two and three, as we were trying causes, a stack of chimnies blew upon the top of that part of the hall where I was sitting, and beat the roof down upon us; but as I sat up close to the wall, I have escaped without the least hurt. When I saw it begin to yield and open, I despaired of my own life, and the lives of all within the compass of the roof. Mr. John Lawes is killed, and the attorney in the cause which was trying is killed, and, I am afraid, some others: there were many wounded and bruised. It was the most frightful scene I ever beheld. I was just beginning to sum up the evidence, in the cause which was trying, to the jury, and intending to go immediately after I had finished: most of the counsel were gone, and they who remained in court are very little hurt, though they seem to have been in the place of greatest danger. If I am thus miraculously preserved for any good purpose, I rejoice at the event, and both you and the little ones will have reason to join with me in returning God thanks for this signal deliverance; but if I have escaped, to lose either my honour or my virtue, I shall think, and you ought all to concur with me in thinking, that the escape is my greatest misfortune.

“ I desire you will communicate this to my friends, lest the news of such a tragedy, which fame always magnifies, should affect them with fears for me.

“ Two of the jurymen who were trying the cause are killed; and they are carrying dead and wounded bodies out of the ruins still. I will write to you again, &c. &c.

*“ JOHN EARDLEY WILMOT.”*

We have scarcely space, to enter upon any of the details of Sir John Wilmot's life, which are only so far curious that they present the singular picture of a lawyer, a successful one too, entirely without ambition. It was against his own wish that he had originally embarked in the profession, instead of the church, to which his inclination led him; and throughout his whole career he was continually endeavouring to subtract himself from the more arduous and toilsome duties of it. Greatness was literally thrust upon him. At

the time of his being raised to the bench, he had retired to his native county of Derby, for the purpose of practising as a provincial counsel; and it was with difficulty he could be prevailed on to accept the dignity thus offered him. His nomination as one of the commissioners for executing the Office of Chancellor, after the resignation of Lord Hardwicke, was by many considered merely a prelude to his taking the seals; and it is certain that some overtures were made to him concerning them. We question whether there was ever yet a lawyer, beside himself, in Westminster Hall, who could express himself as he did on the subject:

“The junior in the commission is a spectre I started at, but the sustaining the office alone, I must and will refuse at all events. I will not give up the peace of my mind to any earthly consideration whatever. \*\*\* Bread and water are nectar and ambrosia, when contrasted with the supremacy of a court of justice.”

When he was promoted to the head of the Common Pleas, he was actually in treaty for the Chief Justiceship of Chester, an office of much less rank and emolument but one that would have enabled him to indulge his favorite plan of retirement and a country life. Horace Walpole says of him, that his constant longing after the condition of a country gentleman was occasioned by his love of wine and fox hunting; propensities of which no hint whatever is given in the work before us. If Mr. Wilmot considered them crimes, we only say with Jack Falstaff: “God help the wicked.”

We cannot select a fairer specimen of the Author's manner, nor a more apt conclusion to this article, than the portrait of Sir John Wilmot as drawn by his Son; which, from all that we have heard and read of him, we must say we have no reason to think a too flattering likeness:

“His person was of the middle size; his countenance of a commanding and dignified aspect; his eye particularly lively and animated, tempered with great sweetness and benignity. His knowledge was extensive and profound, and perhaps nothing but his natural modesty prevented him from equalling the greatest of his predecessors. It was this invincible modesty which continually acted as a fetter upon his abilities and learning, and prevented their full exertion in the service of the public. Whenever any occasion arose, that made it

necessary for him to come forward (as was sometimes the case in the House of Lords, in the court of Chancery, and in the Common Pleas) it was always with reluctance, to perform a duty, not to court applause, which had no charms for his pure and enlightened mind.

"But although he was never fond of the practice of the law as a profession, he often declared his partiality for the study of it as a science: as an instance of this, after he had resigned his office, he always bought and read the latest reports, and sometimes borrowed manuscript notes from young barristers.

"He was not only accomplished in the laws of his own country, but was also well versed in the Civil Law, which he studied when at Trinity Hall, Cambridge, and frequently affirmed, that he had derived great advantage from it in the course of his profession. He considered an acquaintance with the principles of the Civil Law as the best introduction to the knowledge of Law in general, as well as a leading feature in the laws of most nations of Europe.

"His knowledge however was by no means confined to his profession. He was a general scholar, but particularly conversant with those branches, which had a near connection with his legal pursuits, such as history and antiquities. He was one of the original fellows of the Society of Antiquaries, when first incorporated in 1750, and frequently attended their meetings, both before and after his retirement; most of his leisure hours were spent in the above researches.

"But of all the parts of Sir Eardley's character, none was more conspicuous than the manner in which he conducted himself on the bench, in that most delicate and important office of hearing causes, either of a criminal or civil nature; he was not only practically skilled in his profession, but his penetration was quick and not to be eluded; his attention constant and unabated; his elocution clear and harmonious; but above all, his temper, moderation, patience, and impartiality, were so distinguished, that the parties, solicitors, counsel, and audience, went away informed and satisfied, if not contented—"etiam contra quos statuit, æquos placatosque dimisit." This was the case in questions of private property: but where any points of a public nature arose, there his superior abilities and public virtue were eminently charac-

terized; equally free from courting ministerial favour or popular applause, he held the scale perfectly even between the crown and the people, and thus became equally a favourite with both. This was conspicuous on many occasions, but particularly in the important Cause, related before, between Mr. Wilkes and Lord Halifax in 1769.

"In private life, he likewise excelled in all those qualities that render a man respected and beloved. His watchfulness, tenderness, and condescension as a parent, the letters in these pages will abundantly testify. May the remembrance and contemplation of his virtues inspire his descendants with a desire to imitate them! This he would have thought the most grateful reward, this the noblest monument! Such unaffected piety, such unblemished integrity, such cheerfulness of manners, and sprightliness of wit, such disinterestedness of conduct, and perfect freedom from party spirit, could not, and did not, fail of making him beloved, as well as admired, by all who knew him. Genuine and uniform humility was one of his most characteristic virtues. With superior talents from nature, improved by unremitting industry and extensive learning, both in and out of his profession, he possessed such native humbleness of mind and simplicity of manners, that no rank or station ever made him think highly of himself, or meanly of others. In short, when we contemplate his various excellencies, we find ourselves at a loss whether most to admire his deep and extensive learning and penetration as a lawyer, his industry, probity, firmness, wisdom, and patience as a judge, his taste and elegant accomplishments as a scholar, his urbanity and refined sentiments as a gentleman, or his piety and humility as a Christian."

B.

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ART. IV.—*Report from Select Committee on a General Register of all Deeds and Instruments affecting Real Property in England and Wales, with the Minutes of Evidence and Appendix. Ordered by the House of Commons to be printed, 18th July, 1832.*

By the law and usage of parliament, the collective body of members is only capable of receiving information in a regular



and parliamentary way. No matter how long and how fully a subject has been investigated, no matter that publications exist containing the completest summary of all the facts and arguments relating to it; it is absolutely necessary that these facts and arguments, or rather a garbled abstract of them, should be orally repeated to a section of the legislature sitting in one of the minor apartments of the house, be re-printed at the expence of the country, and circulated in large folios becomingly apparelled in blue. The volume before us is a striking proof of the inveterate character of the usage in question;<sup>1</sup> for long before the concoction of it, a ready-made Report existed, thicker and larger, if not broader and bluer, than itself; in which (to say nothing of less dignified publications) the most sceptical and scrupulous of legislators might have found wherewithal to satisfy his doubts. But that Report was made by Commissioners instead of being made by Committee-men, wherefore it became necessary to supersede it by this.

Seriously speaking, we admit the great additional security that each additional inquiry begets; we are very far from regretting the delay, and are glad to have the opinion of parliament, or what, at least, will be regarded as such. But we cannot see the good of re-printing the huge masses of bad logic and tautology to be found in the Appendixes to these Reports; a circumstance it becomes necessary to notify, to justify ourselves for passing over a large part of the evidence and dealing shortly with the rest. Provided only nothing new escape us, it is conceived our duty will have been adequately discharged.

The Report commences thus:—

“ The Select Committee appointed to consider the expediency of a General Register of all Deeds and Instruments affecting Real Property in England and Wales, and to report their observations thereupon to the House, and to whom the several petitions on the subject were referred:—Have considered the matter referred to them, and have agreed to the following Report:—

“ In entering into the consideration of the expediency of

<sup>1</sup> How much trouble, again, might the Committee on Dramatic Representations have spared themselves, and how much good paper have saved, by buying and studying Mr. Collier's excellent History of the Stage.

establishing a General Register for all Deeds and Instruments affecting Real Property in England and Wales, it appears to your Committee, that this question, whether considered with reference to the effects to be produced upon all transactions relating to land, or to the vast change to be introduced in the law of Real Property, is by far the most important of all the alterations which have yet been suggested among the various reforms of the law. Your Committee, fully aware of the magnitude and importance of the subject, have endeavoured to arrive at a just conclusion, by collecting information from such sources as appeared most likely to furnish the best materials for forming a correct opinion; and with that view have called before them many of the most eminent practitioners in the legal profession, and other persons of skill, whom they have examined upon the various points relating to this subject. They have also collected information respecting the different systems of registration which now exist in foreign countries, in Ireland, in Scotland, in Yorkshire and in Middlesex; they have derived much assistance from the Second Report of the Commissioners on the Law of Real Property, with the valuable body of evidence annexed thereto; and they have also examined into the allegations contained in the several petitions against registration which have been presented to the House of Commons.

“ From such materials your Committee now proceed to report to the House the result of their deliberations and inquiries.”—

Then follow some brief remarks on the publicity which formerly attended all dealings with land, and the change which has been brought about in modern times in this respect, till the evils of secrecy have grown to so formidable an amount as to suggest the plan of a general record of conveyances.

“ This is, in fact, to establish a General Register of all Deeds and Instruments;—and so manifest are the advantages of such a system, that your Committee would not for one moment hesitate to recommend its adoption, were they not deterred by the consideration that practices, which the lapse of centuries has introduced, have grown up into a fabric so complicated and well established,—that innovation into such a system might produce mischief even greater than the evil

it is intended to cure. Your Committee have therefore turned their most anxious attention to the consideration of the defects of the existing law, satisfied that unless the present evils should be found greatly to preponderate, no such change of system, however theoretically perfect, ought with propriety to be recommended.

“It cannot be doubted that great evils may arise from dealing with property which has already been the subject of a secret conveyance or transfer,—from land being exposed to sale without the buyer knowing with *certainty* who is the real owner,—or offered as a security without the lender being able to ascertain how far it has been already pledged.

“With respect to the first of these heads,—while it must be admitted that a general registration of all instruments would afford a complete cure for the evil, your Committee are disposed to believe, that, however alarming the idea may be of a secret or concealed conveyance, the mischief does not exist in practice to such a degree as might be anticipated from the constantly occurring opportunities of fraud. Undoubtedly, however, cases of a secret transfer, a concealed settlement, or an unexpectedly discovered deed or will, do not unfrequently occur.

“The evil which arises from the purchaser not knowing with *certainty* who is the real owner,—from the *possibility*, which attaches to every transaction with land, that there *may* exist some unknown deed or claim, which after a lapse of years may start into existence, and deprive the innocent purchaser of the estate which he has paid for, and to which he has a perfect moral title,—is a mischief of a most extensive description, and one which is felt to a greater or less degree in every transfer of Real Property which takes place in this country. The full extent and operation of this evil is not immediately obvious, and requires therefore somewhat fuller consideration.

“According to the present state of the law, no man can be absolutely certain that he has got a complete title to the estate which he has bought, notwithstanding all the vigilance and caution which he may have used before he completed his purchase. So far from being secure, it is always possible that instruments *may* exist which may defeat him, while he has no means whatever of ascertaining whether any such actually

exist or not. The only safeguard which he has at present against such secret charges or conveyances, is a species of fictitious estate, which has nothing to do either with the possession, enjoyment or dominion of the land. What the protection really amounts to which this estate affords, will be seen by examining its nature, and the use which is made of it by conveyancers."

The protection alluded to is the protection supposed to be afforded by Terms, the nature and use of which were fully explained in a former Number of this work.<sup>1</sup> The argument is now pretty generally given up even by those who placed the strongest reliance on it at the commencement of the controversy. After explaining it, the Committee continues :

" The evils which arise from this state of the law, at one moment holding out the legal estate as the only security upon which a purchaser can safely rely,—at another destroying it by the refined subtleties and capricious distinctions which form the whole doctrine of Constructive Notice,—appear to your Committee to be among the greatest deformities which disfigure the Law of Real Property. For these evils a general registry of deeds would be an efficacious, and, in course of time, a complete cure. The register would show every instrument affecting the property, and purchasers having thus the means afforded them of ascertaining the safety of the title, there would be no objection to taking away the protection now given by the possession of the legal estate."

A question agitated at formidable length in the Real Property Commissioners' Report<sup>2</sup> was : whether a party who had actual notice of the existence of a prior unregistered deed, should be allowed to obtain precedence by registering his own ? The Committee decide this question in the affirmative ; adding, what appears to us quite unnecessary to add, that they do not conceive that a party will thus acquire the benefit of a deed obtained by fraud, over which the customary jurisdiction of Equity will remain. We cannot advantageously abridge the remainder of the Report :

" Upon this branch of the subject, then, your Committee are of opinion, that the possible existence of unknown instruments leads, in its various consequences, to evils of very

<sup>1</sup> Law Mag. Vol. IV. pp. 254—261.

<sup>2</sup> Law Mag. Vol. V. pp. 294—306.

serious magnitude. It is scarcely possible to estimate the inconvenience which arises from the feeling of insecurity and uncertainty when you are about to purchase—from the fear, after you have purchased,—that you may lose your estate, notwithstanding every precaution to make your title secure. The former makes men unwilling to buy, or unable to sell; the latter compels them to resort to the dilatory and expensive process of procuring assignments of terms, which may be useless, because a still older legal estate is left outstanding, or because a court may fix a purchaser with notice, or may presume a surrender. This state of the law tends to cramp the transfer of property, and to depreciate its value; it leads to long and expensive investigations into title; inquiries that apply to all properties, whether large or small. If in practice they are frequently dispensed with in small purchases, your Committee conceive that it is not because they are unnecessary,—but because the value of the estate will not bear the expense; and that small properties are frequently bought without inquiry at all, rather than incur the cost of an investigation which would amount to a prohibition on the sale.

“As connected with this part of the subject, your Committee may here notice one of the greatest impediments in the investigation of title under the present system of Conveyancing, namely, that which arises from the difficulty in obtaining the production of deeds of which notice is actually given on the face of the Abstract. The recital in a deed adverts to an instrument without detailing its contents; the purchaser calls for it; he is compelled to call for it, because having notice of its existence, the law presumes that he has knowledge of its contents; it is not, however, forthcoming; it has been lost or mislaid; it may be wilfully suppressed, or may be in the hands of a party who refuses, and who cannot be compelled to produce it. In such a case, the absence of this deed, however immaterial it may really be, is fatal to the title, and the purchaser, unless he choose to run the hazard consequent upon its non-production (and which is frequently done upon the seller making an abatement in the price), is justified in refusing to fulfil his contract. The practical inconveniences which arise from this source, in almost every investigation of title, are acknowledged by every conveyancer; and for this evil there

is no effectual remedy, except a registration of the whole deed.

“ In examining the evils arising from an estate being offered as a security for a loan, without the lender having the means of knowing how far it has been already pledged,—considerable stress has been laid upon the injustice which may be done to a second mortgagee, in consequence of a third tacking his mortgage to the first, and thus squeezing out the second. If this evil stood alone, your Committee are of opinion that, like the suppression of deeds, it is of too rare occurrence to justify so great an innovation as a General Registry. Registration will, however, prevent this; and so far it may be used as an argument in favour of such an establishment. But your Committee consider that in all mortgage transactions, a very important benefit will be gained from any system which shall enable the lender to ascertain with promptness and certainty the exact extent to which the estate has been already incumbered by the borrower. If this could be accomplished, the mortgagee would lend with more confidence, and the mortgagor would effect his loan with greater readiness: the necessity would cease, which now exists, of risking the title-deeds to the whole estate upon borrowing the first small loan. It would enable the party to obtain successive loans from different mortgagees, who would in their turn lend with a full knowledge of all prior incumbrances, but with perfect security that they would be preferred according to their actual priorities. There may be no reason why an estate is not as ample a security for a second or third mortgage as it is for the first; and yet the want of the title-deeds, and the hazard which subsequent mortgagees incur, is such as, in the present state of the law, to throw considerable difficulties in the way of such loans. So inferior a security is a second mortgage, that trustees are not justified in lending money upon it; but if the dealings with the estate could be known with certainty, a second mortgage would be substantially as good a security as a first, provided the estate were sufficient to pay both.

“ A General Register of Mortgages would remedy these inconveniences, and in this respect be productive of the greatest advantages.

“ There is a description of mortgage, created by borrowing

money upon the deposit of deeds, without any further instrument being executed; a species of transaction which plainly proceeds upon the unbounded confidence subsisting between the lender and the borrower; in direct opposition, however, to the Statute of Frauds; and being, moreover, a manifest fraud upon the revenue, which your Committee cannot be supposed to seek to countenance or protect. Several of the witnesses who have given evidence before your Committee, have stated that this practice is of great service to bankers in times of commercial distress, and that it affords the greatest assistance to small farmers and others, who are thus on the sudden enabled to meet a pressing demand, by carrying their deeds to the neighbouring banker, and borrowing money upon the deposit: and it has been urged, that registration will materially interfere with this practice, inasmuch as it is oftentimes of the utmost importance to the parties that the loan should be effected without the loss of time which must necessarily intervene before the Register could be searched, or the memorandum of deposit recorded; and without leading to that exposure which might shake the credit of the party borrowing. Without at present entering into the question, how far it is expedient to encourage such a system, your Committee beg to suggest that the following answer has been given to these objections: the borrower will produce to his banker his duplicate deed, with the certificate of registration indorsed. The banker will then lend upon the confidence he has in the assurance of the party borrowing, that no subsequent deed has been registered, as he now does upon the assurance of the borrower that the deeds he produces are in reality the title to his estate, with these additional reasons for trusting him, that the borrower will be able to show by a certificate, which will accompany his title, that the deeds he produces form the whole title up to the date of the last deed; that the lender can, if he thinks it necessary, instantly ascertain by a search, that there has been no subsequent deed; and direct a caveat to be entered, forbidding the officer to register any other assurance until a regular mortgage is executed, or a memorandum of the deposit entered upon the Register. The caveat being entered, and the Register examined, the security will be as good as in the case of the most regular mortgage; and

the lender, instead of trusting to the word of the borrower alone, has the advantage of knowing that his title is safe, and that if it should be necessary to turn the temporary into a more permanent loan, a perfect mortgage may be obtained with certainty and security. If the banker believes the borrower, he will lend, as he now does, upon confidence. If he doubts, the return of post will prove that the deeds produced are the only deeds upon the Register, and the money will then be lent without further hesitation or risk.

“And this leads your Committee to the consideration of the most prominent objection which has been urged against a General Register; namely, the exposure of men's affairs, which is apprehended from the establishment of such a system. It is said that the facilities of search will lead to a discovery of every defect in titles;—will inform the curious of the embarrassments of their neighbours;—will deter men from effecting temporary loans, from the fear of disclosing their poverty,—and as a necessary consequence of this, that much injury will be done to commercial credit.

“If it were proposed that all title-deeds now existing should be placed upon the Register, undoubtedly the greatest inconvenience would result from the disclosure, which would inevitably take place, of defects in titles; and in looking at the objection which has been made upon this ground, whether by intention or accident it is not for your Committee to say, but it does appear to your Committee, that an apprehension has been excited, encouraging the impression, that registration would produce an exposure of all existing defects. Your Committee consider that there is no foundation whatever for such an apprehension. No deed that now exists will ever be recorded. When a purchaser has accepted a title, he will put upon the Register the instrument by which the title, so far as it depends upon the conveyance to himself, is perfected. He will take care that this deed is effectual to give him the estate for which he has contracted; that it discloses nothing of prior unregistered instruments which can in any way affect his interest; and it can in no wise prejudice him to show to the world that he is really become the owner of that which he intended to make his by purchase. Whoever buys from him, or his successors, will trace the title up to the first registered deed,



and from thence (if necessary) through the unregistered deeds which show the older title. If the title appearing on the Register be not of sufficient standing to afford a warranty against all adverse claimants, the seller must show his title by reference to older deeds, but to none, except those he is actually dealing with, will such disclosure be made. If the title is so far perfect upon the Register as not to require the inspection of the older deeds, it must rest entirely upon the contents of the registered deeds. But no defect patent upon those deeds *ought* to be concealed. Those deeds ought to be disclosed in such a manner as to preclude or defeat all persons who have no interest, and to let in the rightful owner:—an exposure of this kind, and with this view, cannot, in the opinion of your Committee, be too open:—it is the very object and the chief aim of registration.

“Registration will, in very many respects, cut off the *sources* of litigation as regards titles, and make the *causes* of litigation as few as possible; but where it does disclose a cause of litigation, the more fully and completely that disclosure is made, the more it tends to make just litigation easy, the more it aids the rightful owner to obtain speedy and certain knowledge of his rights, and to recover his property from the wrongful possessor. No flaw need be disclosed in old deeds not registered; and if the title appearing on the Register is bad, defective, or doubtful, justice will be done, and the right established by an appeal to judicial decision.

“But then it is objected that a Register will disclose to children their expectations,—will enable strangers to gratify impertinent curiosity,—will discover the pecuniary embarrassments and necessities of persons who wish for concealment,—and by such exposure, injure their credit in a commercial point of view.

“With respect to the first part of this objection, your Committee are of opinion that no practical inconvenience has hitherto resulted from the disclosure which is caused by the Registration of family settlements in Scotland—in the West India colonies—in America—or on the continent,—and therefore that there is no just ground to apprehend evil from the adoption of a similar system in this country; and with respect to the effect of mere curiosity, your Committee appeal with

considerable confidence to the example of other countries less populous than England,—because the smaller the country and the less busy its inhabitants, the more likely are people to find leisure to gratify their curiosity, or to be disposed to interfere impertinently with the concerns of their neighbours. In addition to which it may be remarked, that no inconvenience is stated to have been felt in this respect from the registration in this country of wills in Doctors' Commons and the other Ecclesiastical Courts,—or of copyhold and customary property in those counties where that tenure more than any other prevails.

“ A more important branch of the objection, is that which refers to the disclosure of mortgages, as exposing a man's necessities or injuring his commercial credit. Your Committee are here willing to admit that such disclosure may be painfully felt by persons, who, borrowing with no improper motive, have an undoubted right to retain within their own breasts the secrets of their private embarrassments; but in so far as it may be permitted to human judgment to predict a probable result, your Committee entertain a sanguine expectation that in this country few persons, under any circumstances, will find time to pry into other people's affairs merely to indulge a morbid curiosity, and that if a Metropolitan in preference to a District Registry be adopted, the chances of such searches being made will be incalculably diminished. With respect to the dealings of bankers and commercial men, here there is an obvious motive to investigate, and it cannot be denied that registration will greatly facilitate such inquiries. But looking at the question in all its bearings, your Committee regard this as a benefit rather than an evil. In considering the injury that may be done to the credit of bankers, we ought not to forget the danger to those who put their trust in bankers. If the supposed foundation of a banker's credit be impaired, surely the law ought to help his customers to a knowledge of the fact, rather than assist him, by keeping up the delusion of a false credit, to lay a snare for the unwary, and to perpetrate that sort of mischief so closely connected with fraud, that it is impossible to suppose for one moment that any honourable man would ever desire it. So far, then, as this facility of

disclosure will prevent men from obtaining credit under false colours, or under a pretence of property which does not in fact belong to them, the greatest good will be obtained. It is for the real genuine interest of bankers and commercial men to do away with all false and fraudulent credit;—the fair trader will then be benefited by giving to his general dealings the character of truth—by removing every shadow of suspicion that may by possibility attach to the substantial nature of his property—and by disclosing the real value of his credit, a permanent advantage will be gained to himself no less than to the community at large.

“ Other objections have been urged, alluding to the power which a general Register office would give to the crown, of becoming acquainted with the titles of its subjects, and the use which might be made of such power in a political point of view. To such reasons as these your Committee attach no weight whatever, and therefore pass them by without further observation. The objection on the score of expense has also been stated, and upon this head your Committee consider that further inquiry into the financial details may be usefully directed, when Parliament shall have determined that registration is expedient, and decided upon the manner in which it is to be carried into effect. An objection has also been urged on the ground of delay,—not so much with reference to the time necessary for communicating with the office or for enrolling the documents,—as to the time which will be required for making the necessary searches into title after a vast number of deeds have been collected together. This objection would be unanswerable, unless the plan of registration which is adopted, be so simple in its nature as to render searches easy and certain, without the risk of becoming complicated and inconvenient, like the systems of registration now existing in Yorkshire and Middlesex. Your Committee, however, in meeting this objection, refer with great satisfaction to the plan which has been suggested by the Commissioners on the Law of Real Property, and which, in the opinion of persons most competent to form a correct judgment upon this subject, unites simplicity, with clearness and accuracy, in a most remarkable degree. It is impossible within the limits of a report to enter

into the details of this plan, but after a careful examination and trial, your Committee are satisfied that it is at once effectual and practicable.

“ Your Committee beg also to suggest that if registration be adopted, unless the Register contain the whole contents of the deed, it will in a great degree fail in its object. A memorial tells little more than that a certain deed exists. If the original be either lost or not forthcoming,—the buyer cannot safely complete his purchase. It is worse than useless to him to have notice that a deed exists without the power of ascertaining its contents; and although the registration of a memorial would be a protection against latent incumbrances, it would afford none against loss, nor would it supply a remedy for the evil which arises from the non-production of deeds. Your Committee therefore conceive, that a Register, to be complete, ought to contain a record of the whole instrument.

“ Your Committee have now stated the great inconveniences which belong to the present Law as regards the transfers of Real Property,—the remedy by which those inconveniences may be obviated,—and the leading objections to that remedy.

“ After mature deliberation, your Committee are unanimously of opinion, that a general Register of all deeds and instruments affecting land will be of decided advantage, as regards large purchases. With respect to smaller transactions,—especially those in the country, in which the more cumbrous and intricate proceedings of the Law are generally dispensed with,—your Committee believe that the same facility which would be afforded by a general Register in dealings with large estates, applies equally to sales of small properties; yet inasmuch as the expense of registration will be more severely felt by the latter than by the former, and as sales of small estates are so much more numerous than transfers of great properties,—your Committee feel some doubt whether the benefits to be derived will more than compensate for the certain expense to be incurred. However, as it is plainly impossible to fix any limit, which would not lead to this anomalous result—that all property above a certain value should be governed by one Law, while all below it should be regulated by another,—your Committee are, upon the whole, of opinion, that if the cost of registration could be so adjusted

as to be comparatively small upon purchases below a certain value, the system of registration would be made most perfect, by being made applicable to all lands, without reference to their value."

In abstracting the evidence, we shall take the deponents in the order in which they occur in the Appendix. Mr. Campbell, the President of the Real Property Commission, as befits his dignity, comes first. The topics to which he addresses himself are, the insecurity of titles in the present state of the law; equitable mortgages; inconveniences produced by the loss or mislaying of deeds, which would not have been felt had copies been kept in a Register; the supposed protection by terms; a plan suggested of giving notice of all subsequent conveyances by indorsement on the first;<sup>1</sup> the expense and delay under a register, &c. We shall quote a few of his observations under this last head, as they confidently predicate the mode in which the measure must work.

"Your observations in favour of registry are directed to the state of Real Property, as it exists at present, not to the state of Real Property as it will be if those improvements introduced by yourself into the House of Commons are carried into effect?—I do not think the improvements referred to, or any improvements that can be introduced, will obviate the necessity of registration.

"If those improvements are carried, will they not render registration much more simple and useful?—Most undoubtedly; I believe that no alteration can be introduced into the law which will obviate the necessity for a Register, because the title to Real Property must always depend upon written documents; and a Register is the only mode of ascertaining what written documents exist, affecting any particular portion of real property. I apprehend that a Register is the foundation of all improvements in the law of Real Property, that it will very much shorten conveyances, and simplify the whole system.

"Will you have the goodness to state to the Committee what objections have been suggested to you to registration?—

<sup>1</sup> Law Mag. Vol. IV. p. 264, where this plan is discussed.

One objection which has been strongly urged in the petitions against the Registry Bill has been, that it would occasion great expense. My belief is, that it would save very great expense; that a system of registration extremely simple and economical may be established. The expense to be paid by the party would arise in two ways: first, the search prior to the deed being executed, and then the registration of the deed when it is executed. Without entering into any details of the plan of registration which I should propose, I apprehend that a Register may be so constructed that a search may be made with facility and certainty, and that upon the average the search would not cost more than 10s. Then as to registering the deed, there are two modes in which the registration may take place, either by memorial or by inrolling, or leaving the deed or a copy deposited. Of the two, I should certainly prefer either the deposit of the original deed, or a copy of it, because the deed or a copy will answer many purposes which the memorial will not; and in point of expense, it will be found that a copy of a deed can be made generally for a smaller expense than a memorial, because the memorial requires some skill, and can be made only by a professional man; whereas a duplicate or a copy of the deed is mere stationer's work, and looking to the average length of the deed, calculating what will be the expense of the copy, it is found that that expense is less than is paid for a memorial in the county of Middlesex; and then instead of there being a delay of months or years, which generally takes place now, I apprehend that if a good Register were established, any transfer or mortgage might be brought to a conclusion in a few days, because after the agreement between the parties, the vendor would merely state what his deeds were, there would be immediately an application to the Register Office to see whether the deeds are registered, and whether there are any others registered affecting the property; an answer to that may be received in the course of post, the deed may then be immediately drawn and executed; it will then be sent to be registered; a certificate may be received in the course of post from the Register Office, stating that it has been registered, the purchase money may then be paid, and the transaction is completed."

He distinguishes the Middlesex and Yorkshire Registers, and on being asked as to the Bank of England, replies, that he believes no difficulty occurs in its accounts, but adds that the Register will be conducted on a different system :

“ Is the deed itself, or a copy of the deed, proposed to be registered ?—I propose that it should be in the option of the purchaser, either to deposit the deed or a duplicate, or a copy.

“ At whose expense ?—Of course, at his own expense. It has been stated that it would be a hardship on the purchasers of small properties, having a copy made ; I would leave it in their option to have a copy sent, or if they chose to save the copy, that they should send the original deed. But I think that deeds are likely to be so much altered by improvements introduced into the law, that making a copy will be much less operose and expensive than at present.

“ Do you not conceive that the memorials may be so framed as to meet the great evil you have referred to, of the suppression of facts stated in the deed ?—I think the memorial may be so constructed as to secure that object, for it will always give notice of the deed, and put the party on inquiring into its contents ; but it appears to me that it would be as expensive, and that that would not produce one of the collateral benefits arising from the registry of the deed.

“ Have you made any calculation of the number of folios contained in deeds ?—Yes ; a calculation has been made of the number of folios, upon the average, in deeds, and taking the average of the calculated expense of making a copy, it is found that that expense is less than that of a memorial.”

“ In the case of parties who have deeds drawn out, will not the attorney expect to be paid for the copy for the inrolment as much as for the original deeds ?—No.

“ Would any respectable attorney allow a copy of the deed which must be subsequently witnessed, to be given to a copying clerk ?—I apprehend he himself would be allowed to charge only that which would be a reasonable compensation, which would be less than that of preparing a memorial. In the county of Middlesex there is always a charge made for a memorial, which is greater than the average expense of making an entire copy of the deed.

“ Would there not be great danger arising from mistakes

in those copies, if they are to be made, of great importance?— I should imagine not."

The following remarks on small purchases merit attention:

" Would not the expense of registration bear very heavy on persons making small purchases?—I think not; because, if they need not search, no new risk would arise from their not searching; if they proceed on confidence now, they might proceed on confidence hereafter; then the only expense would be, sending up to London, or wherever the Register Office is established, a memorial, or copy of the deed, which might be done at an expense of probably 10*s*. If there is a metropolitan Register, it is proposed that the expense of transmission shall be equalized by an arrangement with the post-office.

" If there was no search in small properties, would it not be as well to relieve properties of a certain value from all register?—That would be a question of detail; I should think it wrong to do so; they would incur no risk in not making the search, but the purchaser would, for his own safety, send his deed to be registered, for the vendor might sell to another person, and then the deed of another person would prevail over his; that expense would be a mere trifle, I believe not more than 10*s*. or 20*s*.

" Suppose I wish to buy a 40*s*. freehold in the county of Westmoreland, I have to send up to London to know whether the vendor has a right to make the sale, before I pay him the money?—Yes, if you have no confidence in him.

" Therefore of necessity for a small purchaser, searching the Register would exist?—The argument is this, " At present there is perfect honesty, we have been proceeding with entire safety upon confidence;" the same honesty will prevail; they may proceed on confidence hereafter as safely as they do now, for any thing prior to the execution of the deed; but, subsequent to the execution of the deed there is a new burden cast upon the purchaser; he is now in no danger from a deed subsequently executed, but, after registration commences, he will be exposed to that. The deed between him and his vendor will be good without registration, but not as against a subsequent purchaser, therefore, that imposes upon him the necessity of having his deed registered; the only expense will be, the sending it to the county town or to London.



“Do not you also impose upon him the necessity of searching the register-office?—No, at present he runs the same risk.

“Are you aware that in the present register districts, a search sometimes costs more than the worth of the property conveyed?—I know searches have been very expensive; what proportion it has borne to the property conveyed I cannot say; a search would be no more necessary than it is now; now you say they proceed on confidence, then they would proceed on confidence just as they do now.

“How does a small purchaser know that the seller has not already sold, or that he has a title to that he proposes to sell?—There is no new danger imposed upon him at present; there may have been a conveyance executed before, just as there may be now; but it is said, ‘There is such perfect honesty in all transactions, that that danger is disregarded.’

“Are you to be understood that, under the operation of your plan, about 20*s.* would be the average expense of registering, and 10*s.* the expense of search?—I believe that would be so.

“Do you not think that the new system of registration and transfer of small properties will be attended with more expense and more trouble than under the present system?—I think not; there will be the expense of having the deed registered, but I believe that that expense will be much more than counterbalanced by the facilities which will be afforded in small as well as in large purchases. I believe that in small as well as great purchases much expense is now incurred in making out the title. I believe it is in small purchases that the greatest inconvenience is felt, for there the expense at present bears a larger proportion to the purchase money. I believe those making small purchases will derive the greatest advantage; it is lamentable to see what a large proportion of the expense consists in obtaining the conveyance.

“In a small purchase, if a person wishes to be secure, is he not obliged to take the same length of abstract as in the case of a large purchase?—Yes, precisely the same questions will arise.

“Would not the system of registration tend to diminish the length of abstracts?—I think it would.

“Would it not also diminish the length of deeds?—I think most essentially.

“You have stated, that you think registration would greatly shorten conveyances and abstracts; is it not the case, that the present enormous length of conveyances and of abstracts is the mere trick of conveyancers, in order to make great charges to their clients, which could not be obviated by any system of registration?—I believe that deeds are unnecessarily long, and that they are sometimes lengthened for the purpose of swelling the costs of the attorney; at the same time, with the law as now it is in the absence of a Register, I believe the deeds must be very long, and that they must continue to be very long and very complicated. I think they might be very much shortened and simplified if registration were established.”

Mr. Campbell next states his expectation that both abstracts and deeds will be considerably shortened by a Register, denying, at the same time that they are at present so fraudulently extended, for the sake of costs, as has been supposed. He thus meets the objection drawn from the risk of losing the deeds:

“You propose that every original document should be sent to the metropolis for registration?—Certainly, to the register-office, wherever it is established; so it is in Middlesex, so it is in Yorkshire; the deed is always sent to the office along with the memorial.

“In that case the danger of loss of deeds will not be got over?—It is not from the danger of the loss of the deeds in the carriage that the difficulty arises, but the loss of it in the hands of the attorney, through his insolvency or his death.

“In the event of the original deed being destroyed, would the registered copy be evidence in a court of justice?—I think that would be a proper enactment.”

Here ends the first day's evidence. Most of the second is occupied with the often agitated objection of publicity, which Mr. Campbell answers as it has been answered again and again. We think, however, that the clause alluded to in the following questions should be re-considered:

“Does it not appear to you that a very simple remedy, if the Register is not to be open to all the world, could be devised, by insisting upon having the signature of the man to

whom the property belonged?—There might be some difficulty in always determining, upon a demand to search, to whom the property belongs; and an attempt to confine the right of search, either to the person in possession or the person who is dealing with him, I think, would not be expedient, for, that it would deprive the public of many of the benefits of registering.

“Who has a right to look into the title, except the mortgagor or mortgagee?—The *bonâ fide* claimant, who says that the estate is his.

“Is the right of search to be given to a man who goes to the registry office, and says, ‘I claim such a man’s estate?’—The provisions of the Bill are before the Committee.

“Does not the clause, as framed, leave it open to the whole world?—That is a matter of opinion; the clause in page 33 of the Bill confines the right to search a Register to the person in possession, or to a person who is dealing with him, or to a claimant. It is to be observed, that as to wills, we do not hear of improper inquiries. A fraudulent attorney will not come on speculation to inspect titles, for, according to this, no person can require a copy or any extract from a deed, unless he is or represents *bonâ fide*, either the person in possession or a person who really does claim the estate; so that an attorney could not go and find that A. B. who is in possession, is not rightfully in possession, and then advertise for some person whom he may set up in opposition to him. My clear opinion is, that the Register should be as much open as the Register in Doctor’s Commons.”

The clause is said to have been suggested by Lord Brougham, but the term “claimant” is certainly too vague.

On being re-examined as to equitable mortgages, Mr. Campbell throws out a hint which it is not improbable some Chancellor of the Exchequer may take up:—

“You state, that among persons most conversant with the subject, it has been regretted that the present system of equitable mortgage should prevail?—Yes.

“Do you allude to mercantile men?—Successive Chancellors have regretted it; and I believe that bankers and borrowers of money approve of it, chiefly because thereby they evade the operation of the Stamp Laws.

"Are you aware that among all the petitions presented from merchants and mercantile men, they state that they derive great benefit from it, and would be sorry to see it interfered with?—Yes; but if the memorandum and stamp were exempted from stamp duty, I believe they would be perfectly satisfied; and I should observe, that by a bill introduced into parliament by Sir Edward Sugden, though not yet passed, equitable mortgages would be as much interfered with as by registration, for he provides that there shall be no equitable mortgage without a written memorandum, which would be subject to an *ad valorem* stamp duty."

As to the highly important question, what changes the Register will effect in the practice of solicitors, Mr. Campbell explains himself thus:—

"Do you propose that the certificate of the officer shall be sufficient, without sending up a person to make the search?—Most undoubtedly, that there shall be a communication between the party in the country and the Register Office. There has been a great deal of misapprehension or misrepresentation upon that subject. It has been supposed that the effect of this measure will be to deprive the country solicitor of all the profits of conveyancing, and to render it necessary to have an agent in London to make searches and to register the deed; which is entirely a misapprehension or misrepresentation, because according to the proposed measure there would be no occasion whatever for employing any London solicitor or agent; but the solicitor in the country, who is employed by the vendor or purchaser, will himself be able, without employing any other person, to complete the transaction. For example, I will put a case that there is an agreement to purchase an estate in the county of Cumberland; the solicitor for the vendor hands over his abstract to the solicitor for the purchaser; the solicitor for the purchaser will merely have to write a letter to the Register Office in London, inquiring what deeds there are registered, respecting the property in question; he will receive an answer from the Register Office, giving him a copy of that part of the index which respects the premises, and which will disclose to him all the registered deeds which can affect those premises; this being received by the solicitor in the country, he sees whether the

deeds mentioned in the abstract are registered, and whether there be any others that are registered that are not mentioned in the abstract. If he finds that the abstract corresponds with the register, and that the deeds mentioned in the abstract make out a perfect title, he has only to draw the purchase deed, and have it executed; he sends that purchase deed directly to the Register Office, it is there registered, and returned with a certificate of registration; the purchaser is now absolutely secure, and pays over the purchase money to the vendor, and so the transaction is completed."

"Do you think a distant proprietor could transact the business both of registration and of search, without the intervention of a London attorney or solicitor?—That is my opinion.

"Do you not think that the practical working of the bill would be to throw the country solicitors and attorneys out of employment?—I think there would be no such effect. The bill has no such tendency. I believe that the country solicitor would place more confidence in the officer of the establishment, than in a London attorney; at present it almost constantly happens that a London agent must be employed, because there must be searches made, not only for wills, but for judgments. In all considerable transactions, there is a London agent always employed; there is no considerable transaction now perfected without a conveyancer being consulted; the abstract is sent to the London attorney, he consults the conveyancer, and he is employed to search for judgments and inquire after crown debts."

He is asked again as to the probable loss of deeds, and also as to the danger of fire; to which he replies that the building might be made fire-proof, and that four-and-twenty soldiers might have saved Bristol from conflagration. Besides, as he very properly suggests, it is only a duplicate or a copy that is to be deposited. "Were the office burnt down, the parties would only be in the same situation in which they are now. I believe in Scotland they have not duplicates, that the original deed is deposited in the Register Office; I suppose that England is as orderly a country as Scotland, and I have never heard that the risk of the deeds being burnt in Edinburgh has given any uneasiness." Any one who would lay much stress

on such an objection after this, would, we fancy, hardly hesitate to say, that the three members of the legislature should never meet together again for fear of another Guy Faux.

*Mr. Alexander Mundell.* This gentleman's evidence relates exclusively to Scotland. The general effect is, that the system of registration has been long established there without producing any of the evils apprehended from it. For example, Mr. Mundell is asked whether he apprehends any inconvenience from publicity :

“ Do you apprehend any danger or inconvenience from the publicity given to the Register?—That is matter of opinion ; but I believe that the publicity is much less than is generally supposed ; any person dealing with an estate or with a person in the way of loan, of course informs himself accurately with regard to the situation of that estate ; but I do not think it goes much further.

“ Do the Scotch deeds registered contain recitals of previous deeds?—That depends very much upon the nature of the deed ; in general they do not, because a Scotch instrument begins by stating, “ I, the heritable proprietor of the lands here mentioned, do so and so,” and any person dealing with him will satisfy himself that he is the heritable proprietor.

“ The Register in Scotland, you find, does away with the necessity of those long recitals we have in England?—I conceive, in a great many instances, it does.”

The Scotch mode of registering, however, appears to be a very imperfect one, there being either very bad indexes or none ; and there are seemingly as many offices for registering as there are offices for obtaining probates and letters of administration amongst us. Mr. Mundell states that when a deed is registered in Edinburgh, the expense of employing a legal man in Edinburgh is incurred.

*Mr. John Richardson.* This gentleman's evidence also relates exclusively to Scotland. In one material point only does he differ from Mr. Mundell.

“ You have heard a great deal of the latter part of Mr. Mundell's examination?—Yes.

“ Does your idea consist with his?—Yes, in the greater

part. With respect to the transmission of the instrument of sasine to the registrar direct, I think that that would be attended with a disadvantage not adverted to; the agent to whom it is transmitted goes to the Register Office with it, and both he and the keeper of the minute book sign the entry in the minute book, in which are stated the names of the parties, of the lands, of the county and parish in which they are situated, and the day and hour at which the sasine is given in; so that there is a security that no improper liberty will be taken in postponing one sasine to another.

“Do not you imagine that could be done equally by the registrar making a minute of the same particulars?—If it is thought fit to trust to the keeper alone; but if he was disposed to do that which was wrong, he might give an undue advantage to one person over another.”

Mr. Richardson states the average expense of registration in Scotland to vary from seven to fifteen pounds. His general estimate is as follows:

“Are you of opinion that the system of registration in Scotland has been very beneficial to that country?—Extremely beneficial, from the security which it affords.

“State the grounds on which you conceive it to have been beneficial to the country?—I would state generally, the security it gives either in purchasing or in lending; it is almost infallible.

“From your experience as a professional man, has it tended to do away litigation?—I conceive it has in a great degree.

“As far as your experience goes, has it enabled the landed proprietors to borrow money under the rate at which it can be borrowed in England?—I have believed that we could borrow money at a half per cent. less in Edinburgh than in London, and I have ascribed that (perhaps erroneously) to the effect of our system of registration.

“Have you heard the complaint, that small purchases are affected by the expense of registration?—That may be made a subject of complaint, but I cannot say that I have heard it.”

Mr. *Thomas Baker*, a parliamentary agent, formerly in an attorney's office in Dublin, speaks as to the Irish Register. He thus describes the mode of registering and searching:

“Have you any local Register offices?—None whatever.

“All deeds or instruments registered in Ireland are sent to the Register Office in Dublin?—They are.

“How is the deed registered?—There is a memorial of it engrossed on parchment, containing a short abstract, generally the nature of the deed, the parties' names and descriptions in full, the date, the denominations of lands charged, and the short contents, engrossed on parchment. The memorial is signed and sealed by all or some of the parties who have executed the deed, in the presence of two witnesses, one of whom must be a witness attesting the execution of the deed by the party who signs and seals the memorial. This witness attends at the Register Office in Dublin with the original deed and memorial to be registered. An affidavit in writing, which is put on the same skin of parchment that contains the memorial, is made by the witness before the registrar, or his deputy, in the office, in which the witness swears that he is an attesting witness to the deed and memorial produced, that he saw the same duly executed by the parties executing the same respectively, and that he delivers the deed and memorial to the register, to be registered pursuant to act of parliament, stating the precise time, to the *minute*, that he so delivers same. The officer sees that this is strictly correct, as the blank is filled up in the office in his presence, and the hour and minute must be inserted according to the office clock; the officer examines, and if it be the correct and proper stamp, the affidavit being made and the fees paid, the deed and memorial are left with the officer, and the registration, so far as the party is concerned, is complete. A clerk in the office immediately copies into a paper book, for immediate reference, the parties names, in alphabetical order. The memorial is also examined with the deed, and if found that it corresponds with the deed, and that the provisions of the Registry Act have been complied with, a certificate is indorsed on the deed, to the effect that a memorial of the deed was registered, specifying the date and hour stated in the affidavit, and also the number of the book and page therein, in which the memorial is to be found transcribed, and the number affixed to the memorial; and the deed is returned to the party who brought it to be registered.



"Is that indorsement signed by any one in the Register Office?—Yes, by the deputy register.

"The memorial is kept in the office?—Yes, and is filed."

"Have the goodness to describe how you make a search in Dublin?—If I want a search to be made by the office, I give directions in writing for the search I require; either a search for all acts affecting the lands (which I name) for a specified time, or for all acts affecting those lands by one or more persons, whom I also name and describe. I leave those instructions with an officer, he hands it to a clerk, and directs him to make the search; the clerk then gives an abstract of all the memorials carefully from the time required by me, that is copied fair on paper, and signed by the chief registrar.

"Does he state the nature of the incumbrances?—Yes, he states shortly the substance of every memorial which has relation to the particular lands mentioned in the search."

The charge for searching is regulated by act of parliament, but the witness has omitted to specify it. He says that, for a search of forty or fifty years, ten days or a fortnight ordinarily elapses before the answer is returned.

Mr. *Jephson*, M.P., speaks also to the Irish Register exclusively, and gives some curious information as to indexing. In reading the following extract, it will be borne in mind that the difficulty in its full extent is peculiar to Ireland:

"Can you inform the Committee what is the average number of entries made in each registration?—Here are the 300 first memorials registered this year; out of 300 memorials, I find that about 96 of them had one grantor and one denomination of land only; that 54 had either two grantors and one land, or two lands and one grantor; that is, three entries were to be made in the indexes, that 38 had four to be indexed, and that 22 had five. In one case stated there, there are 160 different denominations of land, each of which was separately indexed; and in a deed lately registered, connected with Lord Lorton's estate, there were 767 denominations of land; so that there may have been 767 different entries in the index, relating to one memorial only. That memorial contained 3000 words, including the denominations. The fees under the 9th of Geo. IV. were only 1*l.* 10*s.* to the Registry Office,

and the fees, had my bill been in operation, would have been 10*l.* 6*s.* 3*d.* Even this sum would scarcely have paid the office expenses. One object which I have is, to make the charges of the office more nearly correspond to the expense of doing the business required; at present they are generally much too high, and sometimes, as above, too low.

“ Could any mode of indexing be devised, by which fewer than 767 entries should be made upon the index of that sale? —I cannot answer that, because possibly there may be a great number of aliases of lands in those 767, the same piece of land having different denominations. I have here an abstract of memorial to which there are 18 names of grantors and about 60 denominations of land. This will give the Committee some idea of the difficulty of registering in Ireland, from the number of aliases. Here is “ the manor of Mosstown, and the lands of Kennagh, otherwise Keenagh, otherwise Moss-town, otherwise Mosstown Island.” Whether all this refers to the same land I do not know. Here is another “ Coole-netinch, otherwise Coolnehinch, otherwise Coolnatensie, otherwise Coolnehinch, otherwise Coolnehensie, otherwise Coolene-tensie.”

Generally speaking, this gentleman confirms the account given by Mr. O’Connell of the effects of registration: “ Is it your opinion that even with these defects the registration in Ireland is a great benefit in the country?—A great benefit.” It appears that country attorneys do not correspond directly with the office, but employ a Dublin agent or come up to Dublin themselves.

*Mr. J. H. Christie*, a conveyancer, explains at some length the plan of Indexing proposed by the Commissioners, with whom he coincides except in giving the preference to memorials :

“ If a complete system of Registration were to be established, what are the advantages which it appears to you would be derived to the system of Conveyancing itself, with respect to the shortening deeds?—It is not so much the shortening of deeds, I think, as diminishing their number, which is to be looked for if a complete system of registration upon this plan be established. Upon the great majority of

purchases the longest deeds would be saved, namely, the deeds containing assignments of terms and getting in legal estates, and it is not merely the expense of that deed that will be saved, but also the expense now incurred to get a party competent to execute it. For this purpose you have to take out limited administrations, and in fact the expense is endless of keeping on foot terms of years, which are now resorted to as a sort of expedient instead of a Register.

“And those improvements you could not adopt without a complete system of registration?—I think the insecurity would be felt so strongly that it would depreciate the value of land altogether.

“Would you not in some degree be able to dispense with the recitals that are necessary to connect different transactions?—I think we should; but I am not quite clear how far it would go in that way.”

This gentleman states the present expense of searching for evidence of title and the sense of insecurity as intolerable. On the existing reliance on terms he observes:

“It is considered of so much importance, that I remember the late Mr. Saunders saying, that if he were purchasing an estate for 10,000*l.*, he would willingly give 500*l.* more if he found one of those outstanding estates which he could get assigned to a trustee: he was a man of great experience, and a man whose opinion was eminently entitled to attention.

“Have the goodness to explain why a Register would render it unnecessary to keep those outstanding terms afloat?—Because the effect of an assignment of those terms is to give priority to an incumbrance which in point of time is subsequent; the Register will give effect to all incumbrances according to their priority in the Registry; therefore this end would no longer be answered.”

*Mr. John Bell, K. C.* We give the commencement of this eminent lawyer's examination as it stands:

“You were examined before the Commissioners for inquiring into the law of Real Property?—I was.

“Were you examined once or twice?—I believe two or three times.

“What was your opinion at that time upon the subject of

Registration?—I thought that it would be a very useful thing. The first communication I had with the Commissioners was a written communication, in which I stated my opinion to be, that it would be a very useful thing if a mode could be adopted which would answer the purposes, but that I did not then see what mode could be adopted which would not be subject to great objections, and leave the matter in a worse state than it was before.

“ You have had occasion to talk upon this subject with Sir Samuel Romilly and others of great experience, have you not? —Not much, till lately: I was a very early pupil of Sir Samuel Romilly, and lived in great habits of intimacy with him till his death; when Solicitor General, he mentioned to me, that it had been suggested to him by a noble Lord then at the head of the Administration, that he wished him to consider whether a Registry Act would not be productive of great advantage to the public, and asked me whether I had considered the matter; I told him I had not, for that when it had occurred to me, I could not think of any mode of registration which would not involve the subject in great difficulties; that I thought the present Register Acts were more injurious than beneficial to the public.

“ You never entertained any doubt as to the expediency of the principle of registration?—No; I believe the written communication I first gave to the Commissioners is printed in the Appendix to the second Report, p. 86.

“ Since you were examined by the Commissioners, you have been made acquainted with the plan which has been devised for a General Register?—After I wrote that letter, and before I was examined before the Commissioners, the general nature of the plan was communicated to me, and I thought it an exceedingly good one, and that it would obviate the inconveniences which I had dreaded.

“ Are you well acquainted with the proposed mode of indexing titles?—I think I understand it; I am not sure that I do fully understand it in all respects.

“ Do you conceive that would be effectual?—I think it would.

“ Do you think it would be simple?—I think it would be very simple, and very effectual.

“Do you conceive it would be attended with any inconvenience to the owners of estates in the way of disclosing their titles to strangers?—I think that is more a matter of feeling than any thing else; as far as my opinion goes, I should be very glad to have all my future titles put upon the Register as a holder of land, but to many persons probably it might be very unwelcome.

“It makes no disclosure as to the past?—No: it might be very injurious indeed if it made disclosures of the past, for then we might get rid of many of those guards which the Courts have been throwing around us, by outstanding terms and the like.

“Do you conceive that as to the future any one would be prejudiced by having the whole of his title disclosed, even if it was a defective title?—As to future deeds, I do not think it would prejudice any one's title; I think it is more a matter of feeling than any thing else.

“Would not the registry of a new deed lead the party who examined it to the knowledge of previous deeds?—It might, in many instances, lead him to the knowledge of the existence of previous deeds, and, to a certain degree, to the contents of them; for instance, it might be very necessary to disclose the origin of a term; the recital probably would state, that A. B., one of the parties, was the original trustee of a term created by such a deed; that would inform a reader that there was such a term, and its origin.

“Though you yourself, thoroughly understanding the law, may not be afraid of disclosure; do you not think it a reasonable ground of fear in persons with the general knowledge they have of the tenure by which they hold their lands?—It ought not to be as to future deeds; I think it would render them more secure.

“In the first instance, if such disclosure took place, might it not drive parties to defend their possessions by lawsuits and Chancery suits?—I do not think it would occasion more suits, I think it would diminish them.

“Do you conceive that would be the ultimate consequence, or the immediate consequence?—I am speaking of the title from this time; of course it will require some time to bring the benefit of a Register Act into full effect; but I think, with

a good Register Act, after it has been some time in operation, and a good Statute of Limitation, which we require, and the abolition of Fines and Recoveries, which produce a great complication in titles, it would improve every person's security, and greatly diminish the number of suits."

On being asked whether the expense of making copies in small purchases will not be found an inconvenience, he replies:

"In very small purchases undoubtedly it will; but if there is a purchase of any tolerable amount, I think the expense would not be such as to be any material inconvenience, and I think the purchase must be very small which is not worth the expense of a registry.

"Do you think the effect of a registry will be to increase the expense of small purchases?—There will be the expense of a copy of the deed, and sending it up, and having it registered; of course Parliament will take care that these expenses are limited as much as possible, I mean the official fees; the mere copying cannot be a very great expense; so that I cannot think this an objection to weigh against the great benefits from the proposed Register.

"Your observation goes only to the counties in which there is no Register; now, it cannot apply to Yorkshire?—There they register memorials, and I believe index by names only, to both of which there are strong objections."

He would give registered deeds priority, except in cases of fraud; but he would not hold notice alone to constitute fraud, though it might be an ingredient in the proof.

Mr. *Duckworth*, a member of the Real Property Commission, explains away, clearly and readily, many of the ordinary objections to the plan, and details the proposed method of indexing, which, by the by, is detailed some eight or ten times in the whole. The following appeal to authority is all that we can afford to quote:

"This plan of registration may appear to be attended with difficulties to gentlemen not conversant with the subject, but it has been tried by several eminent conveyancers upon long and complicated abstracts of title, which they had before them in actual practice; they registered every instrument in their abstracts according to the proposed plan, and found that it

was done with the greatest ease and safety. In the manor of Sion, one of the largest in the kingdom, registration has been carried on for eighty years upon a plan resembling the proposed plan, with perfect ease and certainty."

Part of the following information is interesting :

" Do you consider that, under the proposed plan of metropolitan registration, every clerk employed in the office must have an intimate knowledge of conveyancing?—No; very little knowledge of conveyancing will be sufficient for most of them.

" You think it is not necessary for a person who has to undertake a search, that he should have a general knowledge of conveyancing?—No, I do not think it is essential that he should have much. In most cases he will have only to find and send a copy of the Index; and if he should have any difficulties, he would apply to one of the higher officers for directions.

" Then he will be able to conduct the search without that knowledge?—Yes, in almost all cases; certainly in 99 out of 100.

" What is your opinion as to the table of fees?—The commissioners estimated the expenses of registration at 10*s.*; 6*s.* for registering, to be paid to the office, 2*s.* for the postage to town, and 2*s.* for the postage down. This would average the charges for registration throughout the kingdom.

" In your charges, do you propose that the charge should be proportionate to the length of the deed?—Yes, that would be charged by folios. We ascertained the average length of deeds in England. Mr. Adlington, an eminent and experienced solicitor, took the average of the whole of his deeds prepared in his office from the commencement of his practice, and he found it forty-seven or forty-eight folios. In the Bedford Level all deeds have been registered at length for more than a century and a half, and we found that they averaged about forty-six or forty-seven folios. The parties would have to pay according to the length: that would fall on the small purchases much more lightly than on the heavy purchases; but the average price of a copy would not be more than 8*s.* When deeds are diminished in length, as we expect they will be, of course the office copies will cost still less.

“What would be the scale of fees for searches?—The scale of fees for searches was not fixed, but it was ascertained that no search could ever require more than 10s., and that it would rarely exceed 5s.”

Mr. *John Rigge*, deputy registrar for Middlesex, explains at some length the system of registration adopted in his office. As this is not to be imitated, it would be of little use to copy the account of it.

Mr. *Spence*, a member of the Committee, gives a decided opinion in favour of the measure, and states, as a fact coming within his own knowledge as a Chancery barrister, that the evils a general Register would remove, are even more felt in small transactions than great.

“Entertaining these views, I was a little surprised to find so many petitions from commercial men objecting to registration. I cannot but think that these petitions must have emanated from persons standing in the situation of debtors rather than of creditors; for it is impossible that it should be to the interest of those who are obliged to give credit, that the property of their debtors should not be made more saleable than it now is; but there are some allegations in these petitions, which lead me to think that the subject has not been thoroughly understood by the petitioners; thus, in the last petition presented from Liverpool, there is this statement: ‘Being impressed with the opinion that a general Register is not only unnecessary to prevent the suppression of evidence of title, the great evil proposed to be remedied by the Bill in question, but would itself produce much greater evils.’ Other petitions echo this statement. Now the great object proposed to be attained by registration, is not to prevent the evils which may result from the mere suppression of deeds, but to prevent the necessity of resorting to those expensive expedients which have been invented by lawyers to remove the insecurity of title, arising from the possibility which must now exist in every case of the existence of some document affecting the title which is not produced. I forbear to enter into the question of registration more in detail, as I must in that case necessarily repeat what has already been fully stated to the Committee by other witnesses.”

Mr. *J. H. Fisher*, a solicitor in large practice, decidedly



approves of the scheme, and illustrates, by some awfully long bills of costs, the expenses and inconvenience now resulting from terms. He dwells on one supposed advantage of a Register, which we do not remember to have seen mentioned before :

“ Do you conceive the proposed Registry will afford any assistance in enabling parties to establish their rights, which in the absence of the Registry they would not be able to do? —I do conceive so.

“ Will you mention any particular instance?—There is one that suggests itself to me at once, and arises out of a case of frequent occurrence, in the metropolis in particular. It is a case of a lessor proceeding against an assignee of a lease for a breach of covenant. There are many instances in which the lessor is deprived of his remedy against an assignee by being unable to prove effectually the assignment to the assignee, so as to give legal evidence of his actually being assignee, as the lessor has no power to compel the production of the assignment, and generally no means of showing, by other sufficient evidence, the title of the assignee, by which he is deprived of his remedy against the assignee. This would be obviated by the registry, as the assignment would there appear; and if the assignee declined, on proper notice, to produce his original assignment on the trial of an action against him, the registered duplicate would be producible against him, and be as conclusive and effectual as the assignment itself, whereby the lessor would obtain a remedy, which, though legally entitled to, he would otherwise have been deprived of.

“ Are those cases numerous!—Very common in practice.”

Mr. *Holme*, of the firm of Holme, Frampton and Loftus, appears to have been called by mistake, though he gives an evidence well worth quoting :

“ You are solicitor in a very considerable practice in London?—I am.

“ In the course of your practice, have you considered at all the advantages of a Registry or no Registry?—I have never given the subject much consideration, but have contented myself with points connected with it as they have actually occurred. I had the Bill given to me, and I looked at the commencement of it; but I afterwards contented myself with

merely reading the marginal notes; therefore, I may say I am perfectly ignorant of its contents, and I rather think I am attending here in consequence of a conversation which I had with Mr. Hodgson, one of the Commissioners, about a fortnight ago. Happening to have a sum of money to raise for a country banker, by way of mortgage, I told Mr. Hodgson I thought if the proposed Registry had existed, I doubted whether my client would have run the risk of borrowing it on mortgage; because, if any person had seen the registry of it, it might have occasioned him to suspend his payments; for although I believe him to be a man of good property, yet, having his money out on mortgage, he could not get it in to meet a sudden run upon his bank, and at all events might injure his credit; for, as for myself, if I were to know that any banker was borrowing money on mortgage, I certainly would not deal with him.

“As to the case to which you refer, were you of opinion it was a good thing to the person whom you describe, that his affairs should be concealed, or that his affairs should be disclosed?—That they should be concealed. I believe he is a man of very considerable property, and capable of paying all his debts, and leaving a large surplus; but if he was to be called upon to pay immediately, I doubt whether he could do it, for he has lent money upon mortgage, and cannot get it in on account of the depression of the times, and this would necessarily, in my opinion, oblige him to suspend his payments.

“Have you, in the course of your practice, been sensible of many inconveniences which result from a want of registration?—I have not, nor have I; in the course of an extensive practice of thirty years and upwards, both in proper (*i. e.* town) business, and in agency business for above one hundred country attornies, met with any case of fraud which a general Registry would prevent, and I believe such cases very rarely occur.”

Mr. *Adlington*. This gentleman, one of the most eminent London solicitors, is clearly in favour of a Register, but on somewhat different principles from the Commissioners, for he

regards as the chief, what they consider only as a collateral advantage:

"I must confess I do not well understand the present Registry Bill; it seems to me to require a registry of title, rather than of deeds; my opinion is, that a system of registration, founded on proper principles, would be beneficial, and be a means of saving, instead of increasing expense. The loss of deeds, and the difficulty of getting at deeds, I take to be the great difficulties. The suppression and forgery of deeds occasionally occur, but not frequently, the loss of deeds I am afraid has not been rare, and the difficulty of getting at them frequent. I remember a very serious case of the loss of deeds, which happened in the office in which I now am, at the time of the riots in 1780; it was then the house of Way and Shepherd; they were solicitors for a gentleman whose name it is not necessary to mention. There was a cry that the mob were coming to Mr. Way's office, in mistake for Lord Mansfield's clerk of that name; in the moment of alarm, the deeds of different persons were put in bags, to be removed in case of necessity. The mob did come that way, and the bags were removed; those containing the deeds of the gentleman I allude to, were never afterwards recovered; great inconvenience in dealing with the property resulted from it. In my own office, about two or three years ago, being under the necessity of making some repairs which exposed our paper room, a large quantity of paper was stolen by two clerks, who also took away the title-deeds belonging to an estate contracted to be sold; we traced and recovered some of those deeds at Portsmouth, some at Birmingham, some in Gray's-Inn Lane, and some in the city; but although we contrived to get back many of the title-deeds, still the title was defective, and we were obliged, in consequence, to take the purchase ourselves.

"The consequence of the loss of those deeds was, that it was impossible to make a good title?—It was.

"If duplicates of those deeds had been registered, all that inconvenience would have been avoided?—I conceive so."

He also objects to the *caveat*.

"Upon the whole, you are disposed to think that the caveat would encumber the system?—I think so, and might be turned

to bad purposes ; the caveat is intended to remove the difficulties which may arise between the execution of a deed and its registry. I see no reason why there should not be a plain written copy of every deed on parchment in the book-form, just like an attested copy, and to be signed by all parties at the same time with the deed, and attested by the same witnesses ; that copy or duplicate should be transmitted to the office, instead of a memorial. It may be objected, that this cannot be done immediately, as all the parties may not execute. I have known instances where twelve months have elapsed before all the parties could be got to sign ; but I see no reason why the deed should not be registered immediately ; it would be good against all the parties who have signed, and be notice to every body ; and when the other parties have signed, an affidavit of a subscribing witness might be transmitted to the office, and added to the Register. If the deed be never executed by the other parties, it will be known, and thus the exact state of the transaction would appear on the Register ; if it be executed subsequently, you know that also ; and the Register will then be a register of truth."

Mr. *Hodgkin*, the author of an able pamphlet on Registration, states that he has carefully studied the plan, and thinks it will answer in all respects. He illustrates from his own practice the inconveniences of the present system, and answers most of the popular objections. As the fear of preventing equitable mortgages has been on the increase of late, and the Committee seem somewhat impressed with it, we shall quote what he says about that.

" One of the objections which they have pressed most strongly is, the check which they suppose it will throw in the way of equitable mortgage, by deposit of the title-deeds, in consequence of the distance of the Register Office. The first question, of course, ought to be, whether equitable mortgages are really desirable. The best authorities, both judicial and commercial, are clearly against them. This will be seen from the Reports in Equity, and from the Evidence in the Appendix to the second volume of the Commissioners' Report. They are an evasion both of the Stamp Act and the Statute of Frauds ; and they often lead to great litigation, on account of the difficulty of ascertaining the real nature of the transaction.

But admitting, for the sake of argument, that they are really desirable, and that facilities ought to be given to them, then it comes to the question, whether the plan in the present bill will materially interfere with them. On the contrary, I think it will facilitate and improve them. The equitable mortgagee will be much more safe than under the old system, because he will have the advantage of a caveat or memorandum, either of which will effectually secure him against any subsequent dealing with the property. The former would be free from duty, and, by a slight modification of the stamp laws, if thought desirable, the latter might also be exempt."

Mr. *Bickersteth*, K. C. repeats the opinion he formerly expressed in favour of the Commissioners' plan, and draws the following very striking parallel between the existing system and the system to come:—

"Perhaps the most simple mode of considering the effect of the proposed registration would be, to compare the steps which have now to be taken to investigate and prove titles, with the steps which would have to be taken for the like purpose, after the system had been long enough established to bring all titles within its operation. I may presume that a great deal has been said by others of the difficulties which now exist; of the endless searches which are to be made; of the delays, expenses and anxieties which arise, and of the uncertainty which finally remains, after all that can be done has been done to remove doubt. On this subject, therefore, I need say nothing; but when the system of Registration is fully established, one duplicate original of the title-deeds of every estate will be deposited at the Register Office. Another duplicate original, or an office copy, will generally, if not always, be in the hands of the owner of the estate, indorsed or marked with a number referring to the Index of Title at the office. By means of that Index (a copy of which may always be obtained) the owner of an estate will at all times be able to know whether he has in his possession all the deeds which belong to his title; and if he has not got them all; he can at all times procure authentic copies. He may keep his evidences of title in perfect order with the utmost facility, and if he desires to sell or mortgage, there will be no difficulty in preparing a complete abstract in the first instance, and with the abstract he will

deliver to the purchaser or mortgagee, either a copy of the Index itself, or the number or numbers under which the title is indexed at the Register Office. On the other hand, the purchaser, if he did not receive or rely upon a copy delivered to him by the seller, would himself apply to the office for a copy, and would in answer obtain a complete list of all the deeds by which the title could be in any way affected. Comparing this with the abstract, he would ascertain whether the abstract was complete, and generally it would be so, for no man, knowing that his abstract would be tested by the Index, would ever think of delivering an imperfect abstract. The abstract being found complete, the title would then be examined, and for the purpose of showing the abstract to be true, the seller would produce the deeds from his own depositories, if he had got them, or duly certified copies from the office; there would be an end of all question; and if any were accidentally lost, instead of the extraordinary difficulties which are now experienced, resort would be had to the office, and the real nature of the missing deed would be ascertained without delay, and at very little expense. The contrast between this simple and short proceeding, and the difficult and tedious steps which sellers and purchasers are now under the necessity of taking, must strike every one who considers the subject; and, without stating other reasons, it appears to me perfectly clear, that great advantage would be derived from the adoption of the system of registration now proposed. I have heard it objected, that a purchaser may be embarrassed by the Index taking notice of deeds which do not in fact relate to the particular lands comprised in his purchase; and it is true, that where the owner of a large estate has sold it in detached portions, either simultaneously or at successive periods of time, the Index of the title of the person who purchases the lot last sold, will notice the conveyances to all the preceding purchasers. But it is singular that this should be stated as an objection to registration. What now happens in such a case is, that the purchaser ascertains as well as he can the title of the vendor to the lot in question, and receives possession from him. The possession of the vendor is the evidence on which the purchaser relies, that no part of the lot was comprised in any former sale. That same evidence will exist

under a system of registration, and moreover the purchaser may, if he should desire to do so, make himself perfectly sure by examining every former conveyance."

He was recalled on a subsequent day, and examined on all the main questions again, but we have only room for the following extract, in which he accounts for the feeling against the measure:—

"How do you account for the opposition that the measure has met with from the landed interest?—They seem to be in a great measure ignorant of their real interest on this subject; if the case were otherwise, it would be surprising that they have so long permitted their property to remain involved in so many difficulties and uncertainties without attempting to procure a remedy; but not being aware of the circumstances by which their interests are affected, they rely upon others to whom they impute knowledge; and as to those who advise, or whose opinions are adopted, it is to be considered that the question turns on probabilities, and of two men considering the subject fairly, one may honestly give more weight to a supposed objection, and less weight to a supposed advantage than another. The conclusion is therefore different. Others again, pleased even with the difficulties which their own industry and skill frequently enable them to subdue, may not be displeased at the same difficulties remaining stumbling-blocks to persons of less ability, and, enjoying a just eminence in the present state of things, may find it difficult to bring their minds to an impartial consideration of the question, especially if they have previously formed and declared an adverse opinion with reference to the present Register Offices, and have not taken the trouble to learn the details of the present plan. *I should be sorry to impute personal motives to persons who are far above them in such a case; but I think it must be admitted, that there are some who anticipate from registration a loss of occupation profitable to themselves, however unnecessarily expensive to those for whom they act, and a loss of a very substantial influence of another kind.*<sup>1</sup> Considering the opinions entertained against disclosure, and the various intanglements in which the landed interest is involved, I confess that I am not surprised at the opposition offered to

<sup>1</sup> The influence alluded to, we believe, is that derived from the custody of deeds.  
—Edit.

this measure, which I think likely to be so beneficial to them. I may add, that the individual opponents with whom I have conversed on the subject, seem to have formed their opinions on the effect of the present Register Offices, and not to have studied the details of the present plan, which is so entirely different."

Considering the immense number of country practitioners that have bestirred themselves against the bill, it would be absolutely ridiculous to deny that their opposition is wholly unconnected with personal motives. But those personal motives suggest a serious argument against the scheme. We have contended again and again that it is of the highest importance to keep up the character of the profession; and that no greater curse can be inflicted on any country than a set of mere action-bringing, quarrel-fomenting attorneys. At present it is thought disreputable to appear too often in the courts; the creditable source of profit is conveyancing. Change this state of practice, and the whole rank and character of provincial attorneys will be changed, and all the evil consequences above hinted at will ensue. We do not say they will ensue from the Registration Bill; for it is our matured opinion that the country solicitor will have as large a proportion of conveyancing practice as before; but we wish it to be understood that something more than the interest of a peculiar class is involved in the apprehended effect.

Mr. *Bellenden Ker* has more than ordinary claims to attention on this subject. He is a conveyancer in large practice and a law reformer of long standing;<sup>1</sup> he has written a good pamphlet on Registration, and has evidently paid more than ordinary attention to the plan, which is very fully and clearly described by him. We regret, therefore, that from his having been anticipated in most of his general remarks, we can only afford to extract a passage or two. On being asked whether the intervention of a town solicitor will be necessary, he replies—

"Yes; I have no doubt it may be done in the most simple and the safest possible manner, and that the details may be so

<sup>1</sup> "Some years ago I wrote an article for the *Edinburgh Review*, suggesting, generally, many improvements in the law, which are now proposed by the Real Property Commissioners."—*App.* p. 153.



arranged as that the most perfect security could be obtained; the only inconvenience will be, the small risk of sending by the post; this is as nothing; Mr. Croker,<sup>1</sup> I think, observes, that in all his official life he never lost above two or three letters. The extreme carelessness of parties respecting title-deeds has always been a subject of constant surprise to me; I have frequently lying about in my chambers many very important documents, such as agreements, &c. &c. which are sent by solicitors, rather than be at the expense of taking copies. Any one conversant with the careless way deeds are dealt with, and who heard that one of the objections to a Register was, that it would be necessary to transmit the deeds by post; must, I think, smile. There is another point which I think will tend very materially to the simplifying of conveyances of small properties; these may be generally done very simply, and I have no doubt very soon after the establishment of a Register, printed forms of conveyances would be adopted, particularly as the cause for any recitals would in most cases be removed; these forms might be adopted with very great ease. In France, I believe, much is done by way of printed form: much is done even in this country already by printed forms: all the conveyances by the Commissioners of Woods and Forests, &c. are by printed forms. I have no doubt that persons most conversant with conveyancing would frame such general forms as would enable six out of ten conveyances to be done with merely putting the names of the seller and purchaser in the margin, and the parcels in a Schedule.

“Does any thing else occur to you upon the subject of the inconveniences of the present system?—I am not aware that I can add any thing further; I may mention in favour of Registry, that Mr. Gibbon, when he was about to be a lender on mortgage, seemed to feel the full benefit of Registry, though when he experienced the difficulty of selling, from having lost some of his deeds, he seemed inclined to throw all the blame on the lawyers, asking Lord Sheffield how long mankind would be content to live under their dominion and control; but when he employed Lord Sheffield to lend his money

<sup>1</sup> The observation is made by Mr. Croker, in the Preface to his edition of Boswell's Johnson, with reference to the memoranda supplied to him by Lord Stowell, which were lost on their way to Sir Walter Scott.—*Edit.*

for him, he begged him to be sure to pick out a Register county, and to take every possible precaution."

In explanation of the Index, Mr. Ker read some observations prepared, with his usual conciseness and perspicuity, by Mr. Duval.

*Mr. Senior* is decidedly in favour of Registration, and approves of the plan proposed by the Commissioners in all its essential parts. He thinks, however, that small purchases should be relieved from the expense :

" Do you think the having to send a copy of the deed to London to be registered, and then its being sent back, would add much to the expense of dealing with small properties?— I should be very much inclined to exempt very small properties from the expense altogether, to allow deeds to be registered free of expense where the property was under 100/. I have always thought that the scale of duties imposed by the stamp laws, increasing in severity as the property diminishes in value, is most unjust and most mischievous: it tends to create, what is a great evil both morally and politically, the extinction of small properties. If I had the re-modelling of the Stamp Acts (and they very much want re-modelling), I would abolish all duties on properties of less value than 100/."

He gives the following opinion as to Foreign Registers ?

" Have you any knowledge of the Foreign Registers?—A general knowledge that they exist in every country but England, and I am told that they work very well. I believe that in most cases the original deed is retained in the public office. I am the holder of a mortgage in Trinidad, which is drawn in the Spanish form; it is a notarial act, a certificate by the notary that such a person appeared and pledged the property for so much money; it is very much like a copy of Court Roll.

" Would that apply to the transfer of property here?—I should think so.

" Have you any experience of the French Registration?— I think I have seen some of their deeds. It is clear that their system of conveyancing must be effectual, or there could not be so many small proprietors, and such frequent changes of property. I have understood that in Belgium the expense is

very trifling, and the safety perfect; the time of prescription is, I believe, only about thirty years."

We may mention here that one of the best short accounts of the foreign systems is to be found in the shape of a *Thèse* written for his degree as licentiate by M. Wolowski, a Polish law student at Paris, in August last.

*Mr. J. J. Wright*, solicitor, of Sunderland, objects to the scheme chiefly on the ground of additional expense and delay, the risk of losing the deeds, and the risk of mistakes by the Registrar. He also states, that in one large parish of Sunderland, the lands are held by copy of Court Roll, and that he frequently meets with a disinclination to mortgage, from a dislike to the consequent publicity. *Mr. J. Wright* is subsequently questioned as to the Ship Registry Act, and admits that it has operated beneficially:

"Be good enough to state to the Committee why you think the registration of shipping beneficial, and the registration of real property not beneficial?—For this reason: a ship is a valuable moveable chattel, passing from one port to another; and inasmuch as sales and mortgages might take place at a distance from the port where the ship belongs to by the master or person in possession,—I mean, suppose possession were the only evidence of property,—it is proper that the person who has the command of the vessel should have some official document from some Office of Registry to show the title to the vessel, and to show who is the true owner, otherwise a man might be deprived of his property by the fraud of his servant."

This gentleman gives a striking testimony as to the state of opinion in the country as to the Registration:

"Do you think that the whole inconveniences of a general system of Registration would be greater than the whole benefit to be derived from it?—Most decidedly I do. I have felt no inconvenience, no practical inconvenience, and I have known no instance where any has been felt by others. Although my experience is not very great (only a nine years' practice), I have conversed with solicitors of forty or fifty years' standing, in Durham and Sunderland, who entertain the same opinions and the same views of the question as myself. My acquaintance with country solicitors is very general

and extensive in the county to which I belong, but I do not know one single individual amongst them favourable to Registration ; all are against it."

*Mr. Coote.* This gentleman is examined at considerable length, and were the question one of recent origin, we should think it necessary to quote largely from his evidence ; but, viewed with reference to the present state of the controversy, we find but little which wears the grace of novelty. The general effect is, that he is opposed to the present scheme, but not to the principle of Registration :

" In the present state of the law, then, you consider terms as advantageous ?—Undoubtedly.

" In the case of a purchaser or mortgagee, you think it an advantage to him there should be outstanding terms ?—Yes, I think it is a decided advantage.

" Supposing a perfect Register was established, would not these become quite unnecessary ?—Yes, if the Register carries notice.

" Then there would be only one single title ?—Undoubtedly, and such might be very desirable ; but my doubt is, whether a perfect Registry can by possibility be established, except at an enormous expense.

" If there was a Register that you could search with facility and certainty, then the titles would be absolutely secured ?—Undoubtedly.

" What would be your plan for establishing a Registry of that sort ?—A survey of the whole kingdom, and mapping of all the houses and every acre, and dividing the kingdom into small districts, and establishing Registers in every such district.

" Would not the subdivisions of property, and the joining together of property before subdivided, soon render such a survey and plan of very little value ?—To meet this evil, new surveys must from time to time be made ; this would in a great measure remove the great objection I feel to a Register depending upon a search of names."

This plan of mapping, it may be remembered, was first propounded in Mr. Tyrrell's Suggestions, in which the germs of so many original and ingenious plans of reform are to be found. At the same time, Mr. Coote admits the great merit of the proposed Index.

" You prefer this plan explained in the Bill now depending in the House of Commons to any antecedent plan of Index ?—Undoubtedly, I think it very clever, and it answers its purpose as much as it is possible for such a thing to do ; the objections I take the liberty of pointing out apply to all Registers referring to a list of grantors' names."

Mr. *Matthew Pearson*, a solicitor of Selby in York, gives some useful information as to the Yorkshire Register. He is favourable to registration, but apprehends danger from the loss of deeds on their road to the office, and prefers the Yorkshire system of filing memorials to that proposed by the Commissioners.

Mr. *Stephenson*, barrister, formerly Deputy Registrar for the West Riding of York, gives a clear description of the Yorkshire system. Though the Indexes are exceedingly imperfect, he speaks in high terms of its advantages.

" Do you conceive a Registry in Yorkshire is very useful ?—Yes.

" Notwithstanding the small number of searches ?—Yes.

" If there were no searches at all, the Register would be a dead letter ?—Yes ; but looking at those instances where searches have been made, and taking into consideration the losses which have, to my certain knowledge, been avoided by making the searches, I should say it was of the greatest possible advantage.

" Is it of frequent occurrence that, after a search, the abstract which has been delivered, is found to be incorrect ?—Yes.

" Are there many searches made from curiosity ?—Not many.

" Can any party, by paying a fee of one shilling, make any search he pleases ?—Yes."

Mr. *Preston*, the eminent conveyancer, is decidedly opposed to the scheme, and there is probably no man living better qualified to trace the workings of it. He begins his evidence thus :

" Have the goodness to state how long you have practised as a conveyancer ?—From the age of sixteen to the present time, *i. e.* forty-eight years.

" Your business has been extensive ?—Very extensive.

" You have favoured the profession and the public with a number of publications on the Law of Real Property?—I have published several volumes; the first work at the age of twenty-two.

" Have you attended to the question of registration?—I have constantly looked at the subject practically since it first arose; it was started when I was a member of the House of Commons, and then I opposed it, from a conviction that it was not adapted to the laws and transactions of this country, and at that time the objection prevailed.

" Do you still retain that opinion?—I do; though I admit that great advantages would be gained from a registration, as applied to large purchases, for I do not conceal for a moment that if I were buying an estate at 20,000*l.* or upwards, I should, as a purchaser, be anxious to find a registered title, *i. e.* access to every possible information; but if I were buying an estate of small value, such as 100*l.* or 200*l.*, or even 500*l.*, I should be decidedly against a registered title, because to be safe, in common prudence, I should be bound, if I began a search, to make it complete, and I should not know at what point to stop.

" If a property of this sort were sold to an unwilling purchaser, it is obvious the expense of investigating the title through a Register would cost more than the purchase-money. The plan of this registration, from the very cursory view I have taken of it, *for I have looked into the Bill for the first time within the last hour*, offers to the party the option of depositing the deed in the public office, and of keeping a duplicate. In small transactions of this sort, the property would not bear the expense of a duplicate. Suppose, again, that he was to make a copy for his own use, that copy would cost money. It frequently happens, and unfortunately, that a conveyance of property not worth 200*l.* will be as long as a conveyance of property of the highest value. Another difficulty occurs: when once a deed, or agreement, or *caveat*, is on the Register, it cannot be taken off; and many titles which have a blot or difficulty in them, are preserved from litigation by carefully abstaining from sale, mortgage, or other exposure, and protecting them by a fine with non-claim.

" Again, there are frequently jointuré deeds, or deeds for

raising portions, and those deeds are disregarded when the jointure is determined, or the provisions are satisfied. So there are contracts for sale, which are abandoned, and the agreement cancelled, and frequently they are neglected when the contract is completed. Now all those, and similar deeds and instruments, once upon the Register, must be kept there, and form a part of the abstract; so that a title which might honestly be made to appear very simple without a registration, must, in order to be satisfactory on a search of the Register, have those deeds, &c. included in the abstract, since otherwise the purchaser's solicitor cannot make the proper inquiries, or will have notice that this abstract is not complete; and the moment that notice is returned to him from the office, that there are more deeds or instruments than those for which the solicitor inquires, he must in an instant be alive to an inquiry for the contents of those deeds. Now the abstract upon a small purchase may cost nearly the whole amount of the value of the property. There are many titles in which the abstract will run from a hundred to two hundred sheets of paper: the charge for that abstract will be ten shillings a sheet; that charge would consume the whole value of the purchase-money on a small purchase."

He denies the existence of frauds to any thing like a formidable extent, but admits that two have been played off on himself individually. He thinks that the constant occurrence of ordinary frauds will present an insuperable obstacle to the formation of an easily accessible Index, and objects that after the establishment of a Register there will be two sorts of investigation necessary, one for the part of title that is on the Register, and one for the part which is not. He also seems to think that an unanswerable argument is deducible from the probable occurrence of such a case as the following:

"There is another circumstance: many properties never change hands in any manner whatever for 50 years, some for 100; and in some instances there are titles for 300 years, and never a single deed or will in the family which can be found. I had an instance, within the last three months, of a title which had gone through a family for 150 years, without a single deed or will in it. About 30 or 40 years hence, some families will sell for the first time; there will be no deed, and

very probably no will. In what a situation would that title be!"

He conceives the duties of the searcher to be of far more importance than is generally thought:

"The duties of search are to be imposed by the act on an irresponsible officer, that is, on an officer who is not to be answerable for damages as the result of his search or certificate. In the nature of things, the principal of the office cannot be the person to search. The magnitude of the duty would put the search beyond his power. He must trust it to other persons. It will frequently require the utmost acumen, both of mind and of knowledge, to make a search with care. No human being, except he be acquainted with the subject, can comprehend the anxiety which is felt even by those who have experience in getting at a knowledge of the deeds which are material to the title when it becomes complicated. Titles will sometimes divide themselves into 100 shares or more; I have known many instances of that sort. In the last year I purchased a share of a manor which was divided into aliquot parts below 100. To arrange and digest a title of that description, even with an abstract in your hand, is a task to which very few minds are equal; but to have that title traced by a person without interest, and without local knowledge, would be totally impracticable. A solicitor having the papers before him, and looking at the facts, with an intimate knowledge of the object of his inquiry, cannot, without the greatest difficulty, bring a title of that description into an intelligible form. No human being would trust a mere agent, or his clerk, in such a transaction; and at present the practice is, for all solicitors of eminence and of character, whenever there is to be an investigation of important deeds material to a title, not to trust to an agent, but to go personally themselves to make the search, either to London, if the deeds are there, or to go where they are to be found."

We pass over those parts of his evidence in which the ordinary objections are pressed, and come to Mr. Preston's second appearance before the Committee with the view of giving his opinions upon the Bill, which it seems he had studied in the interim:

"Is there any thing you wish to add to your evidence,



which has occurred to you since you were last before the Committee?—Upon looking further into the subject, I have endeavoured to find out what the principle of the Bill is, and it is contained at the middle rather than in the beginning. The principle evidently is to get rid of the rules of equity, and every transaction is to have priority according to its registered date. That is in direct opposition to the present rules of a court of equity. That is the first principle the Bill destroyed. The next principle is a most extraordinary one. In the first place; you will not suffer a man to protect his equity by obtaining a legal estate, after this act comes into operation. The second principle is, if a man has obtained the most honest title he possibly may, and he has not registered his deed, another person, having a full knowledge of the transaction, is at liberty to take a conveyance, and by priority of registration he will have the better title. That enactment will destroy every thing which we have understood to be the principles of justice.

“That is not a question of registration, or no registration?—The whole Bill aims at the accomplishment of that object.”

Mr. Preston must have known very little indeed of this or any other scheme of registration, if what he states himself to have discovered in the middle of the Bill came upon him by surprise; and he seems to us to have trusted a great deal too much to his powers of extemporary reasoning throughout. For example:

“It would only be the saving of a few inches of parchment, because there may be an assignment of the term on a piece of a very small size; and you have only to assign such a lease for so and so in the Register Office, which may be done in two or three lines?—No doubt you may totally alter the system of conveyancing, and may make it not worth the pursuit of any liberal man to engage in it.

“Do you, then, think that deeds are to be lengthened, to add to the profits of professional men?—I do not say that they are; but you must change the whole system, and get some one who will be master of the science, and be able to bring deeds into a small compass, as in the register of writs; that this may be done I am quite confident.

“In your opinion, deeds, by the exercise of great skill and

learning, might be very much shortened?—*There is not any doubt on that point; give me a settlement on 20 skins, and a large fee for doing it, I will bring it into five skins; but it will cost me ten times the labour to have prepared it originally.*

“ But registration would not have that effect?—Not registration of itself; that makes no change.

“ After you had once, by great labour, skill, and learning, got the essence of your settlement of 20 skins into 5 skins, might not an inferior artist, copying your reduced precedent, make use of it with a very small matter of your learning and experience?—It is impossible to say what may be done; but whoever is acquainted with the errors which are committed in the profession, will hardly trust to any man, unless he be well versed in his profession, to embark in a new system. A very large proportion of the profession are the children of habit; they have old forms to which they have been accustomed, and which are safe, because they have had the advantage of practice and experience; they have been proved to be correct by their result. Any attempt at a scientific alteration of the modes of conveyancing would, for the next 30 years probably, lead to ten times as many errors as have in the same period been committed under the present system. Besides, registration does not profess to aim at this object. I merely state the inconvenience which would arise from losing the possession of the deeds, and the facility of carrying on various operations by indorsement; as the appointment of new trustees, the assignment of leasehold interests, and the like.

“ Might not that be done by reference?—It might be done, but you will completely alter the system. If you believe that the profession as a body will do all they can to prevent money getting into their pockets, you believe what, according to human nature, will not happen. Take, for example, special pleading, with which the Honourable Chairman is more familiar; do you not believe that I could get any plea shortened to one-third of its present length, and that the effect of it should be equally efficient; look at a count on assault and battery.

“ The Judges, acting on that principle, have reduced various forms in use to one-tenth part of their length?—I think they have done quite right.

“ In your opinion, might not deeds be reduced in the same proportion?—*I have tried many hundred times in my life to reduce a deed as much as I conveniently could without losing a part of its substance, and from my own experience, and it is confirmed by the opinion of Mr. Butler, that, labour as much as you will, you cannot prudently take out one-third part of a deed prepared with ordinary care. To make a deed consistent, every part of it should be equal in style; it should be full throughout or short throughout; now certainly you may put all the limitations in a marriage settlement within one-third of the compass, or less than they occupy; and so with covenants, you may take out many words that would shorten them. If that be the object, the public should employ some person to prepare forms which may be relied on; attempts have been made to introduce short forms, but they have never been followed to any great extent.*

*We defy any man on earth to reconcile such opinions as these.*

*Mr. J. Nicholetts, a Somersetshire solicitor of the highest respectability, and a man of information and intelligence, seems to anticipate all possible evil and no counterbalancing good from a Register. He denies the frequency of frauds—which, by the by, has never been insisted on, but only the possibility of them, and the necessity of taking measures accordingly; a distinction well stated in the Report—and lays great stress on the enormous apparatus that will be necessary. He computes that 150,000 deeds will be brought to be registered in a year to an office only capable of registering half of them; and, carrying on the calculation, concludes, that at the end of a century nine millions of deeds would remain unregistered. The obvious answer is, that unless all deeds can be registered, no attempt to register any will be made. Besides, it is stated in the Commissioners' Report from specified data (as the issue of stamps, &c.) that not more than 70,000 deeds will require to be registered in a year. Mr. Nicholetts also objects that equitable mortgages will be prevented, to the great detriment of bankers,—and leases for lives, to the great detriment of landed proprietors. We should be glad to copy his remarks on these subjects, as also what he says on the nature of country transactions, had we room.*

*Mr. Vincent Stuckey*, a Somersetshire magistrate and the most extensive banker in the West of England, is clearly of opinion that equitable mortgages would be greatly checked by a Register, and that bankers as well as farmers and tradesmen, borrowers as well as lenders, would suffer a serious inconvenience in consequence. This gentleman's opinion may be dissented from, but it is certainly entitled to the highest respect.

*Mr. David Veasey*, banker of Huntingdon, confirms *Mr. Stuckey's* statement. He adds, that to ask a gentleman who applied for a loan to allow a memorandum to be registered, would be regarded as an affront and probably break off the transaction.

*Mr. John Pyne*, solicitor, of Somersetshire, presses all the general objections. He states that small transactions (under 500*l.*) form the majority of sales and transactions throughout the kingdom; and feels confident that the effect of a Register, with respect to a very great proportion of these transactions, will be a prohibition.

*Mr. W. B. Thomas*, solicitor, of Chesterfield, goes at length into the general objections to the bill, to which he is opposed. This gentleman furnishes some useful information as to the mode of transacting mortgages in his part of the country.

*Mr. Giles Miller*, solicitor, of Gouldhurst in Kent, thinks that the measure would produce more evil than good, and leans towards the plan before mentioned of indorsing subsequent incumbrances on title deeds. He apprehends great trouble in searching, and great inconvenience from publicity.

*Mr. F. Dalton*, formerly in the office of the Wakefield Register, confines himself to that establishment.

*Mr. Ralph Barnes*, of Exeter, states, that he has not merely paid great attention to Registration since the introduction of the bill, but has had it in his mind during the whole of his life. His evidence is consequently full, and marked undoubtedly by considerable information and intelligence. He objects to the clause requiring an assertion of interest to give a party the liberty of search, as ineffectual, or, if effectual, as fatal to the measure. He thinks publicity would clearly put a stop to the system of equitable mortgages, which

he says prevails to a great extent in his neighbourhood. He complains of the Index as complicated, and prefers District to Metropolitan Registration: "Now I have no doubt but that the money, I say thus unnecessarily, spent in the carriage of deeds to and from London for the county of Devon, would amply pay the whole of the expenses of the establishment there, to say nothing of the fees upon registry, which, if it be any advantage, might also fairly be distributed in the districts from whence they arise. Suppose there were 5,000 deeds a year for Devonshire, containing a population of about 500,000, this would make nearly 100,000 in the year for all England. The Commissioners say 70,000; I am confident that is much underrated; and I see on the Second Report of the Commissioners, the whole number of deeds and agreement stamps used in Great Britain in 1825, is very nearly 400,000, which would induce me to think that the deeds would amount to nearer 200,000 than 100,000."

*Mr. J. T. Brockett*, a solicitor of Newcastle-upon-Tyne, confirms all the general objections, and apprehends great danger from the scheme. As to the feeling respecting it—

"Is there not in the community at large a feeling against a general Register?—Most assuredly there is; owners of property, as well as mortgagees, in the North of England, as far as I have been able to ascertain their sentiments (and my opportunities have been frequent) are decidedly hostile to the measure; I have conversed with many on the subject, and find them unanimous.

"Have they not generally believed that all their deeds were to be taken from them?—They did apprehend so at first; and they still look upon the enactments regarding the deeds in a great measure as a delusion; they consider them, in effect, as taking away from them the best evidences of their title.

"Have they not some apprehension that government are going to take their estates from them?—The very ignorant may think that, not persons of intelligence. There is some misapprehension abroad about the particulars and details of the Bill; I have no doubt many do not understand it; a person must indeed possess more than ordinary acuteness who can clearly comprehend the whole of it."

This gentleman admits that there are many evils in the present system, and proposes the following remedies for them :

“ Are there not some cases in which the present system of conveyancing may be beneficially changed!—I think a beneficial alteration might be made in regard to second mortgages, marriage settlements, and first conveyances under inclosure acts. These, candidly speaking, are the only instances in which I myself, as a private individual, consider a Register could be of any possible use. I would find other means to cure the existing defect.

“ State what you would propose to have done?—I would suggest a parliamentary enactment, holding it necessary to the validity of a second mortgage to have a notice of it indorsed on the first mortgage deed, and making it incumbent on the first mortgagee to permit such an indorsement to be made. I would also propose that the trustees under every marriage settlement, and not the tenant for life, should have the actual custody of the deeds; and that where any powers under the settlement were executed, it should be done by an indorsement on the settlement itself, or by a deed annexed to it, and not by a detached instrument, and that no appointment under a power should be otherwise valid. As to first conveyances under inclosure acts, I would require a memorandum of them to be indorsed on the original award of the Commissioners, which always remains with the clerk of the peace.”

*Mr. W. C. Walters*, barrister, of Newcastle, appears to have viewed the subject in all its bearings, and has certainly made out some strong arguments against the Bill. The two passages in his communications to which we are more particularly anxious to call attention, are the following :

“ What is your estimate of the expense which would be occasioned by the proposed plan of registration?—This may be best answered by saying what the process would be in ordinary cases. First it will be advisable to register a contract. Very little importance at present is attached to the form of a contract, and it is seldom prepared, if prepared at all, with much care, for as soon as the conveyance is executed, it is not regarded; but under a register act, the case would be different, it would be a permanent link in the title. The abstract, then,

would have to be perused, to ascertain who were the parties competent to contract, and the contract would be prepared accordingly, and transmitted to the office to be registered. Together with the contract, the solicitor would transmit instructions for making a search. The preparation of these instructions would in many cases, after the Register had been in operation some time, be a matter of some difficulty, and require at all times great care; it would require a thorough knowledge of the title. It is proposed to indemnify the solicitor against any error in the search, but he would still be responsible for error in the instructions. The preparation of the contract and the instructions for the search would be so very important, that the aid of counsel would often be called in at this stage of the business. If, for example, the contract did not comprise and bind every interest intended to be purchased, the purchaser might be damnified by an instrument registered between the registration of the contract and the conveyance. If the search were satisfactory, the next step would be the examination of the abstract with the deeds in the register office; for they would in fact be the important deeds, the most conclusive and highest evidence as to the title. Suppose by the omission of some words in the deed sent to the office, a purchaser or mortgagee took only an estate for life, would the title be marketable until it were ascertained by a search that the vendor or mortgagor had made no subsequent conveyance, and that a conveyance in fee had been duly registered? It must here be observed, that this examination, upon which the safety of the purchase would so greatly depend, could not, in the case of country transactions, be made by the confidential solicitors of the parties, but by strangers to them and their interests and the property desired, or by mere clerks. Hence, too, it would be necessary that in every purchase in the country two solicitors should investigate the title; one in London to examine the deeds and transact the other business at the register office, *and the other in the country to prepare the contract and conveyance, to ascertain the identity of the property, and make inquiries as to the deaths and marriages of parties, &c.* After the abstract were verified and the title approved, it would be necessary in every case to have two copies of the deed, one for the use of the party and the other

to be sent to the office; a second copy, too, would be required in the office, according to the evidence of Mr. Stephenson, the deputy-registrar for the office for the West Riding of Yorkshire. (see p. 397.) Thus there would be three copies of every deed. This short detail, which assumes that the plan works well, and is perfect, shows that a considerable expense would be incurred in the case of every purchase, merely in respect of the Register; and if the search should show any error or variance, if any mistake should be discovered in the indices, inquiry and delay would be occasioned, and of course expense. Though some part of the expense, as of carriage, may not be paid directly by the parties, it must be borne by them indirectly, or be thrown upon the general funds of the nation.

Again: "Besides the expense, do any particular inconveniences occur to you as likely to arise from a Register?—It would be necessary to have recourse to such an office, not merely for the purpose of searching the Indices, but also, at least in some cases, of examining and perusing the contents of the deeds. A very important and laborious part of the investigation of a title affecting land in the country, would thus be thrown upon solicitors in London; I cannot believe that official deputies and clerks would be trusted in this matter; and thus parties would be deprived of the benefit of the exertions of their own solicitor. A solicitor, in the country especially, has many incentives to industry; his professional character and livelihood depend upon his care; he is continually subject to the jealous and scrutinizing notice of his brethren; and should any loss occur, he must meet the reproaches and complaints of his client, often his friend and neighbour. Is it wise, then, to paralyze exertion so extensive and so valuable? Whether the effect of a general Register in London would ultimately be to concentrate there all solicitors of any influence and talent, I will not venture to decide, but undoubtedly such would be its tendency, and the possibility of the result should be taken into consideration. I should deprecate this result in a political point of view, as pregnant with the worst consequences. It is plainly the interest of a state that intelligence and integrity should be as extensively diffused among its subjects as may be; not that its metropolis alone should be mighty in wealth and the acquisitions of the mind, but that all its members



should have their proper strength. Now it is certain that solicitors in the country constitute a very important class in the community. In every populous district there are many who possess the respect and confidence of their neighbours. In their professional capacity, such men diffuse throughout the community a spirit of fair dealing and honourable courtesy: they scorn to support a client in any course where his object is to defraud or oppress; they protect the poor from the oppression of low and unprincipled attorneys, who are chiefly restrained by the fear that their practices would be exposed by men who can see through and appreciate their knavery. The honourable men, too, to whom I allude, compose many differences; they, in fact, constitute an admirable and most efficient domestic forum. But this is not all; they are known to and respected by the resident nobility and gentry, and connect them with the other classes of society; they represent the wants and grievances of their districts to the member of the legislature, and furnish much useful information; and they, too, are among the foremost supporters of all institutions for promoting the welfare of their fellow-citizens. A measure, then, which may drive from, or diminish in, our provinces so useful a class of men, should be treated with the greatest suspicion."

We have already intimated that we agree in the general tenor of these remarks, though our apprehensions are not quite so strong of a concentration of all intelligence and integrity in the metropolis. Indeed Mr. Walters himself has clearly shown that no such consequences will ensue. According to the first extract, the country solicitor will have an elaborate contract and elaborate instructions, in addition to his ordinary work, to prepare; and it is not made to appear that any part of that ordinary work will be taken from him.

*Mr. W. Taylor*, deputy-registrar for the West Riding of York, confines himself to the registrar of that Riding exclusively.

*Mr. J. H. Shaw*, solicitor of Leeds, and formerly chairman of a Committee for reporting on the Wakefield Indexes, gives some useful information on that subject. We quote his account of the expense,

"What is now the usual expense of registering a deed at

Wakefield, and of the search; and can either be reduced?—I have had a calculation made in my own office, of a number of deeds taken indiscriminately from 1817 to this time: they amount to 91. The office fees, for registering, amounted to 31*l.* 3*s.* 1*d.* which would be 6*s.* 8*d.* a deed; the whole expense, including the memorial and the journey, and every thing connected with the Registry, is 218*l.* 2*s.* 1*d.*; that would average 2*l.* 6*s.* 7*d.* a deed. If we deduct from that the charge for the journey, (which I think should be discontinued, and which is a guinea on each deed) and the stamp on the memorial (which it is proposed to discontinue, and which is 10*s.* more) there would be 1*l.* 11*s.* to deduct, and that would leave an average of 15*s.* 7*d.* a deed on 91 deeds.

Mr. W. Beale, solicitor of Maidstone, dwells at some length on the general objections. He says that he has been at some pains to collect opinions upon it, and that a great majority of professional opinions are unfavourable.

Mr. A. Baring, a member of the Committee, has given a decided opinion upon points as to which he is a most influential authority:

“Do you conceive that the value of land would be at all increased by a general Registry?—I think generally that any thing that adds security to the holding of land, or facility to disposing of it, adds to its value; that many people are indisposed to buy land, from an apprehension that they may get a bad title, or from an apprehension that it will be months or years before the thing is settled, or that if they want to sell it, they sell it with all the difficulties and embarrassments of time in disposing of it. It is clear that land would be worth more years purchase if it were practicable to bring the title of it to the same easy solution as that of the three per cents; this is notoriously impracticable, yet you may approach something to it, and, *pro tanto*, you certainly improve the value of land.

“You do not feel the same conviction of the expediency of registration with respect to very small properties?—It would require more minute inquiry and more information than I possess to solve this difficulty; but I have my doubts whether in small properties you could subject them to registration; I have my doubts, and yet there are circumstances in which perhaps facility might be given, and certainly security, to the

holding of small properties. When you come to deal with the title to a cottage and garden, a man frequently brings from under his thatch, or from some corner of the room, something that he calls a title, that is very seldom any title at all; and it is possible that if there was in that district any means of registration, that his title would be more perfect than it is; at the same time, the process of registration might be so expensive and inconvenient, that at last the very small proprietor would from necessity deal with it without any interference of the kind; he would trust to the chapter of accidents, and transfer it in some rude shape that could not pass under any system of registration.

“ Have you taken into consideration the effect that registration might have on the various dealings of confidence, such as equitable mortgages and the like?—I think it would decidedly facilitate mortgages; that the persons lending would lend with more confidence under a system of registration, and that the person borrowing would have less reluctance to borrow under a system of registration; that in the first place it might prevent the necessity of the borrower risking all his title-deeds in the hands of a person from whom he may take up a comparatively small sum of money. The general Registry is a sort of third hand in which a deed may be said to be deposited for the general benefit of all persons concerned in it. But I believe, according to the present system, any person borrowing, supposing he has an estate worth 100,000*l.* and he borrows 5,000*l.* or 10,000*l.* must deposit the whole of his deeds with the person who lends the money, that therefore he naturally feels a reluctance to let his titles go out of his hand, and that if there was a system of registration which would hold the deeds for the benefit, in succession, of whosoever might be interested in them, that it would give confidence to the lender and to the borrower at the same time.

“ Do you apprehend any danger to the credit of bankers, owing to the publicity given by the registration?—I think, when we speak of danger to the credit of bankers, we must also consider danger to those who trust bankers, and I should say in that case as in every other case, any measure which prevents people obtaining credit under false colours, or under an appearance of property which in reality does not belong

to them, is most desirable. I have never found any respectable banker who would not rather see with pleasure that the public had that species of security. Undoubtedly the case may occur, that a man may be apparently in possession of a large landed estate, and may have very little real interest in that estate; but the real genuine interest of bankers and of commercial men is to do away with all fraudulent credit, and all credit obtained under false appearances. I should say that as a general principle, the fair dealer will be benefited by establishing truth in the general dealings of his profession. So far from a disadvantage, I look upon it as a most valuable part of the bill, that it would be the means of defeating false credit.

"Then you do not think it would be a bar to fair speculation?—Indeed I do not.

"Are you of opinion that there has been an overtrading in England during the last ten years?—Constantly; there is a constant succession of overtrading.

"Do you think the Registry will at all operate as a check upon that?—I think it rather would. The general trade of the country is not much connected with landed property; landed property is principally held by the bankers of the country. The general trader only puts in land that superfluous portion of his capital which he does not want for the purposes of his business, and if he is a merchant in active business, unless he is very wealthy, he has very little capital of that description to spare."

He expresses one pleasurable anticipation in which we do not think the majority of his brother members would sympathise; that it would materially facilitate the means of ascertaining the qualification of members of parliament. This qualification, by the by, should be abolished immediately, or be more effectively enforced. It is now merely a troublesome and ridiculous form.

Mr. Moore, Registrar of Deeds in Ireland, describes the Irish system, and states that the country is satisfied with it.

Mr. J. G. S. Lefevre comes too late to be able to add much to the argument, but his authority is deservedly high, and we therefore extract two important statements of opinion from his evidence:—

“ Have you turned your attention to the bill called Mr. Campbell’s Bill?—To the present bill for establishing a General Registration, and I confess I approve of the plan extremely.

Is there any alterations that you would suggest in the Registry Bill?—I think not. As far as I can see, it has been prepared with the greatest care, and it approaches nearer to perfection and completeness than I could possibly have expected.”

In conclusion he adds: “ Availing myself of the opportunity of revising and correcting my observations, I beg to say, that if the supposed case was to take place in its worst form, and if the Register and Indices were to fall into such inextricable confusion as to render it impossible to find the instruments which had been registered, and that the system should then be abandoned, the following results would, I think, take place; (namely) that a person intending to purchase land, or to advance money on it, subsequent to the abandonment of the Registry, would be almost exactly in the same state in which he would now be under the present system, if he was dealing for land in the title of which there were no attendant terms.”

Mr. N. Hollingsworth, a solicitor, was shortly examined as to the customs of particular manors in Northumberland and Cumberland.

The Appendix was printed only just time enough to enable us to make this meagre abstract of its contents, our readers therefore must have the goodness to draw their own conclusions from the additional materials presented to them.

H.

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#### ART. V.—WILLIAMS ON EXECUTORS.

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*A Treatise on the Law of Executors and Administrators, by Edward Vaughan Williams, of Lincoln’s Inn, Esq. Barrister at Law, in Five Parts, pp. 1272 and Index. Adapted to be bound in either one or two volumes. Saunders and Benning. 1832.*

WHEN we first visit the newly acquired mansion of a friend, before our approbation can be complete, the mind must be

satisfied, first, that it is suitable to his station and circumstances; next, that it is well arranged, and all its parts in due proportion; and then, that it is well furnished. If there be a failure in any of these particulars, our congratulations are not full and free; we perceive a want which prevents us saying that the whole is good. Now we are somewhat similarly affected when we review the works of our learned friends; first, is the bulk and extent required by and suitable to the subject; secondly, is the arrangement good; and thirdly, is the furniture such as we can approve. Mr. Williams it will be observed has not confined himself to any narrow bounds: twelve hundred and seventy-two closely printed royal octavo pages is surely space enough; but when we consider the extent of the law with which Executors and Administrators have to do, we should be rash in saying, this is unsuitable and disproportionate. Being satisfied on this head, or at least suspending our judgment, we proceed to investigate the arrangement of the author.

"Part the first" is naturally enough "Of the appointment of Executors and Administrators," and this occupies seven "Books," each book being divided into chapters. We need scarcely say, that the author confines himself, except incidentally, to wills of personal estate. The first Book is "Of the origin of Wills, and of their nature and incidents." Book the second, "Of the making, revocation, and re-publication of Wills and Codicils." Book the third, "Of the appointment of Executors and their acceptance or refusal of the office." Book the fourth, "Of Probate." Book the fifth, "Of the origin of Administration and of the appointment of Administrators." Book the sixth, "Of the effect of Probate and Letters of Administration, as long as they are unrevoked;—of the revocation of them, and of the consequences thereof;" and Book the seventh, "Of the Stamp duties on Probates, and on Letters of Administration."

"Part the second," "Of the estate of an Executor or Administrator," has four books. "Book I. "Of the time when the estate of an Executor or Administrator vests; and of the quality of that estate." Book II. "Of the quantity of the estate in possession of an Executor or Administrator." Book III. "Of the quantity of the estate in action of an Executor

or Administrator;" and Book IV. "Of the estate of several Executors or Administrators; of the estate of an Executor of an Executor, and of an Administrator de bonis non; and of the estate of an Executrix or Administratrix, who is a feme covert."

Having ascertained what constitutes an executor, and what estate he acquires in right of his office, we should learn what he can and ought to do. "Part the third," therefore, is "Of the powers and duties of an Executor or Administrator," and is divided into five books. Book I. "Of the power and authority of an Executor or Administrator." Book II. "Of the duties of an Executor or Administrator with respect to the funeral, the proving the will, and the taking out administration: the inventory, and the payment of debts." Book III. "Of the duties of an Executor with respect to legacies." This book contains all the doctrine relating to legacies, and occupies about 200 pages. It is certainly incumbent on an executor to know whether a legacy be vested or contingent, whether on condition or simple, whether accumulative or not; whether it be satisfied, released or adeemed; whether specific or general; but still we think as this doctrine is the subject of so many separate treatises, and requires so much space to do it justice, that our author would have acted wisely in omitting it. Book IV. "Of Distribution under the statute and the customs of London and York." The information here given respecting the customs is fuller and more satisfactory than we have elsewhere met with. But we trust that these customs will shortly become matters of history, and not of practice. It is surely unwise that the succession to personal estate should not be the same, at least throughout England. And the impolicy of retaining them is strongly shown by the ignorance which prevails respecting them, even in the districts themselves. Their operation is sometimes very harsh. If an intestate in York leaves a widow and children, the widow has  $\frac{1}{3}$  of the whole personal estate, and the children the remainder: but further, suppose there be a widow, one child, seven grandchildren by a deceased son, and six grandchildren by a deceased daughter; the widow has first  $\frac{1}{3}$  of the whole, and the only child alone has  $\frac{1}{3}$  by the custom, for it does not recognise grandchildren; then the widow has by the statute,  $\frac{1}{3}$  of the remaining third, the only child  $\frac{1}{3}$  of the same third, the

seven grandchildren  $\frac{1}{4}$  of one-third amongst them, that is  $\frac{1}{3}$  part a-piece, and six grandchildren  $\frac{1}{4}$  part each. Again, on some points there is considerable doubt. It is clear that leaseholds are not within or affected by the general custom of the province of York, but there is reason to think, though it is disputed, that leaseholds in the county of Durham are by a special custom existing in that county subject to the same law as the other personal estate of a man dying intestate therein. Book V. "Of the Stamp Duties on Legacies and Successions to Personal Estates."

"Part the fourth," "Of the Liabilities of an Executor or Administrator," contains two books. Book I. "Of Assets," and Book II. "Of the liability of an Executor or Administrator in respect of the acts of the deceased; and of the liability of an Executor or Administrator in respect of his own acts."

"Part the fifth" is "Of Remedies," and Book I. therein, "Of Remedies for Executors and Administrators," and Book II. "Of Remedies against Executors and Administrators."

We have now taken a general survey of the different sections in our learned friend's building, and, we venture to say, it is suitable and commodious. Had our space allowed us to have set forth the subjects of the *chapters* into which the *books* are divided, it would have appeared that nothing important is omitted; and against the sin of omission a legal writer should specially guard.

We must now speak of the furniture; and this we rejoice to say is substantial, and to a practical man most satisfactory. The respective chapters, in fact, contain the wisdom of all the decided cases on the subject, well arranged and condensed. There is occasionally cause to regret that the author has not trusted to his own strength, and given a little more discussion and investigation; but we can safely say that he has given us what is of great value to practitioners, a luminous and correct statement of the law of executors and administrators. Such is our sentence, and we trust it is as just as it is impartial. We do not pretend to have read the whole of the work, but we have gone through many parts, and need not rely upon *ex uno*, but may say, *e multis disce omnes*. One part of this excellent Digest, we think, will be peculiarly acceptable,—the



information extracted from the reports of cases in the Ecclesiastical Courts; these reports have not been regularly published till of late, and their contents, though very important, are not generally known.

The nature of the work before us will, we think, be sufficiently apprehended by the general description we have given, and we need not trouble our readers with extracts; we will, however, insert one:—

“ It is now settled that a will, whether of personal or real property, cannot be set aside *in equity* for fraud and imposition; because a will of personal estate may be annulled for fraud in the Ecclesiastical Court, and a will of real estate may be set aside at law; for in such cases as the *animus testandi* is wanting, it cannot be considered as a will.

“ If a man (said Rolle, C. J. at a trial at bar,) makes a will in his sickness by the over-importunity of his wife, to the end he may be quiet, this shall be said to be a will made by constraint, and shall not be a good will.

Importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist; such as will render the act no longer the act of the deceased, not the free act of a capable testator, in order to invalidate the instrument.

A will made by interrogatories is valid; but, undoubtedly, when a will is so made, the Court must be more on its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition, than it would be in an ordinary case.

With respect to a will obtained by influence, it is not unlawful for a man, by honest intercession and persuasion, to procure a will in favour of himself or another person. Neither is it to induce the testator by fair and flattering speeches, for though persuasion may be employed to influence the disposition in a will, this does not amount to influence in the legal sense; and whether or not a capricious partiality has been shown the court will not inquire. But where persuasion is used to a testator on his death-bed, when even a word distracts him, it may amount to force and inspiring fear.

The sort of influence which will invalidate a will, is thus

described by Eyre, C. B., in *Mountain v. Bennet*: ‘There is another ground, which though not so distinct as that of actual force, nor so easy to be proved, yet if it should be made out, would certainly destroy the will; that is, if a dominion was acquired by any person over a mind of sufficient sanity *for general purposes*, and of sufficient soundness and discretion to regulate his affairs *in general*; yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind.’

But the influence to vitiate an act must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear.”—pp. 36, 37. This passage is supported by numerous authorities, but we need not quote them. We have only to add that the work has an excellent Index.

W.

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#### ART. VI.—PROPOSAL FOR A GENERAL RECORD OFFICE.

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*A Proposal for the Erection of a General Record Office, Judges' Hall and Chambers, and other Buildings, on the site of the Rolls' Estate, together with some particulars respecting the Suitors' Fund.* London. 1832.

IN noticing, upon a recent occasion, the appearance of Mr. Cooper's work on the public records, we expressed a hope that the time had arrived in which those valuable treasures would no longer be permitted, by the apathy of persons in power and by the abuses of their agents, to remain useless to the community, or to be exposed to the manifold perils which surround them. A small tract, which has since appeared from the same pen, confirms the hope that was then in us, and leads us to believe, as sanguinely as we dare believe in the accomplishment of any beneficial public measure, that an important

step is about to be taken for the preservation of the public records, and for making them accessible to all persons who are interested in consulting them.

It is quite obvious, without adverting to the often exposed abuses which prevail in most of the record offices, that there ought to be one general receptacle of the various historical, legal and literary documents of a public character. We are fond of boasting, and not without reason, that England is richer in such remains than any other nation; and yet there is no country in which they are worse kept, or more barbarously shut up from the great mass of persons who would resort to them for beneficial purposes. Even if students or other inquirers were permitted to inspect them without the payment of the heavy fees which are extorted under the present system, it would be an impracticable task to journey from the State Paper Office in Westminster to the Tower of London, to ascend the garrets and lumber-rooms of the Exchequer, or to dive into the vaults of Somerset House, as often as it might be necessary to refer to the precious documents which are there entombed. It can hardly be said to be consistent with common sense, much less is it in accordance with the enlightened spirit that seems now to be at work, that these records should lie, in some places so situated that the rats and the damp are exercising their united energies to destroy and deface them, or that in another they should be deposited within the dangerous vicinity of a gunpowder magazine. The first step towards remedying these crying defects is the establishment of a common repository in which the records would, at least, be carefully preserved and placed within the reach of those persons who have occasion to examine them. The other (hardly less necessary) conveniences, the formation of indexes and the reduction of fees, would follow such an improvement, but can hardly be expected to take place without it.

The plan proposed by Mr. Cooper for this purpose is extremely simple and feasible. The house lately occupied by the Master of the Rolls, and now untenanted, save by some of the papers belonging to the Record Commission, with the chapel and the adjacent offices, stands upon a large plot of ground bounded on one side by Chancery Lane, on the other by Fetter Lane, at one end by Symond's Inn and a region of

hovels and stables, and at the other end by Serjeants' Inn and Clifford's Inn. A great part of this ground is wholly vacant, and that which is built on is occupied by erections of no such value that they may not, without sacrilege, be converted to other objects. Upon this tract it is proposed to build a quadrangle, the centre of which shall be occupied by a record office capable of containing the various public documents at present scattered over the town, and in which they may be preserved, as far as human prudence and care can preserve them, from the accidents to which they are exposed in their present trebly hazardous abodes. The sides of the quadrangle, it is suggested, might be appropriated as courts for the Master of the Rolls, the Court of Exchequer, and the Court of Review in Bankruptcy, out of term, as chambers for the Judges and Serjeants, who, it must be confessed, are at present very unworthily lodged, as offices for the Examiners, Cursitors, and other officers of the Court of Chancery, leaving a very large supply of chambers for the use of barristers and attorneys, to whom such places of business would be especially convenient and desirable. By these means, Mr. Cooper calculates, and, as it seems, without the slightest exaggeration, that the whole expense occasioned by the proposed conversion would be met, and thus that a great public benefit would be attained without any additional burthen. The only difficulty in the way of the plan would be the want of the funds necessary to complete it, and which it has been ascertained would amount to about £300,000, and this difficulty Mr. Cooper suggests an unobjectionable mode of obviating.

"Many persons," he says, "conversant with building speculations, do not hesitate to affirm that not only may capitalists be found to advance the money required for the erections upon mortgage of the estate and buildings, but that many enterprising builders would gladly contract to erect and finish the record offices, courts, &c. upon a long building lease being granted to them, at a nominal rent, of such part of the area as would not be required for those edifices. Considering the extent of the Rolls' estate, the great value of all the ground in the neighbourhood, and the difficulty of procuring chambers, even of an inferior kind, at a convenient distance from the spots where the principal equity business of the country is

transacted, these opinions will, it is apprehended, deserve attention, should no other mode present itself of attaining the object in contemplation. It is confidently, however, submitted, that the most beneficial course for the public would be to borrow the necessary money from the Suitors' Fund, a portion of which may be very safely advanced upon the security of the Rolls' estate and the new erections."

In an appendix, which is not the least valuable part of the work, Mr. Cooper gives a succinct statement of the origin of the suitors' fund, and the amount to which its successive accumulations have reached, after the large drafts that have been made upon it for purposes no more generally useful, if there be any more useful, than that he now recommends. Another advantage to be derived from such an establishment would be the extinction of the payments now made out of the public money in the shape of salaries to the several keepers of Records. During their lives, these gentlemen should (with a due regard to the vested interests which so many people in this country have in being largely paid for doing nothing), be permitted to receive the stipends they have so long enjoyed; but in future it will perhaps be thought no outrage to their venerable memories, if the expense of keeping the Records should be defrayed out of the amount of moderate fees to be paid by the persons consulting them, and for which those fees will be abundantly sufficient.

This plan has, as we hear, already been sanctioned by the Master of the Rolls, whose permission was indispensably and in the first instance necessary, by the judges, who will very gladly exchange their caverns in Serjeants'-inn for more suitable chambers, and by the Record Commissioners, one of whom, not the least distinguished for his good taste, and the energy with which he supports all measures of public utility, has given it his best assistance—we mean Lord Dover.

Although much has been said upon the subject of the present state of the Records, we cannot quit the subject without noticing one amongst the numerous complaints which have been very justly made respecting the unnecessary and unworthy obstacles which are presented to inquiries in which all the world is interested.

The author of a very valuable and acute work, entitled,

"A Memoir of Sebastian Cabot," has been enabled to clear up one of the main difficulties connected with the discovery of the American continent, by means of the original patent granted by Henry VII. in 1498, to John Cabot, the father of Sebastian, and he thus relates the manner of his finding it :

"The manner in which the precious document referred to, and others of a similar kind, are kept, cannot be adverted to without an expression of regret. They are thrown loosely together without reference even to the appropriate year, and are unnoticed in any index or calendar. It required a search of more than two weeks to find this patent of 3d February, 1498, although the year and day of its date were furnished at the outset. Another document, which appears in the present volume, the patent of Henry VII. to three Portuguese and others, dated 19th March, 1501, authorising them to follow up the discoveries of Cabot, has never before been published. This also was discovered, after a long search, not even folded up, but lying with one half of the written part exposed, and, in consequence, so soiled and discoloured, that it was with the greatest difficulty it could be deciphered, and some words finally eluded the most anxious scrutiny. And this, of two documents indispensable to the history of maritime discovery, and for the want of which the account of these voyages has been completely unintelligible. An extraordinary compensation is claimed at the Rolls' chapel on account of the trouble attending a search amidst such a confused mass. For finding the documents, two guineas were demanded, in addition to the cost of copies. The applicant is informed, that the charge must be paid, whether the document be discovered or not, so that the officer has no motive to continue perseveringly the irksome pursuit."

By means of this patent the author of the work we have mentioned, establishes the claim of Cabot as discoverer of that continent which bears the name of Amerigo Vespucci, who did not make his first voyage until 1499, when Cabot was prosecuting his third to the same shores. "Yet," says the author, "while the name of the one overspreads the new world, no bay, cape, or headland recalls the memory of the other. While the falsehoods of the one have been diffused with triumphant success, England has suffered to moulder in obscurity, in one of the lanes of its metropolis, the very record, which establishes the discovery effected by the great seaman fourteen months before Columbus beheld the Con-

tinent, and two years before the lucky Florentine had been west of the Canaries." Let us hope that such a state of things will not for the national credit be permitted any longer to disgrace us, but that future inquirers may have more fair play for their labours, and that the world may not be cheated for the sake of some few mousing antiquaries, or of more insignificant record keepers, of the advantages which the research and industry of historical students would willingly contribute.

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ART. VII—ANTIQUITIES OF MARITIME LAW.

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*Collection de Lois Maritimes antérieures au XVIII<sup>e</sup>. Siècle.* Par J. M. Pardessus, Membre de l'Institut de France, Académie des Inscriptions. 4to. Vol. I. 1828. Vol. II. 1831. Paris.

WE mention this compilation with the double motive of paying our humble tribute to the high merits of the editor, and of assisting him, so far as in us lies, in his arduous and meritorious undertaking, by spreading the knowledge of its object and character. It is a hard thing to say of England—but we fear that the circle within which an extended notice of a work on the antiquities of maritime law would be interesting, is too narrow to admit of our venturing on one. We shall therefore content ourselves with a short account of the plan.

M. Pardessus' purpose is to unite in a single compilation all ancient documents of worth in all languages relating to the *Droit Maritime Privé*, as he expresses it; that is to say, all customs, statutes or laws, having for their object to regulate the respective relations of the owners and builders of ships, privateers, captains, crew, passengers, insurers, &c. Custom-house ordinances, and those which relate to public matters without involving questions of private interests, are not included in the plan. Its scope, however, will best appear from a simple enumeration of the principal sources from which most of his materials have been drawn, and the contents of the two volumes he has put forth.

The first and most ancient collection of the sort, the *Consolat de Mar*, is already well known by name in this country. It is in Catalanian, and the *princeps* edition of 1494, one volume in folio, contains twelve ordinances or documents relating to maritime law. The second is a work in Dutch, entitled *Boeck der Zee-rechten*, (Book of Sea Laws). M. Pardessus states that it has passed through several editions, but he does not mention the date of the first. The third, also in Dutch, entitled *Nederlands Seerechten*, (Sea Laws of the Netherlands), is a collection consisting of the Compilation of Wisby and the ordinances of Charles V. and Philip II. published in 1711. The fourth, in French, was published by Cleirac, an advocate of Bourdeaux, in 1647, under the title of *Us et Coutumes de la Mer*. The fifth is an English work, *A General Treatise of the Dominion of the Sea*. The sixth, in Italian, is entitled *Biblioteca de gius Nautico*, commenced in 1785 at Florence and left unfinished. The seventh, in German, is the *Corpus Juris Nautici oder Sammlung aller See-recht*, published at Lubeck in 1790, by Engelbrecht. The eighth and last, like the first, is in Spanish, *Codigo de las Costumbres Maritimas*, published at Madrid in 1791 by Capmany.

Each of these collections was compiled with the view of being useful to some particular country. The same pieces, consequently, are frequently to be found in several of them, and the compilers have given only translations of laws promulgated in another language than their own. M. Pardessus proposes, as already intimated, to bring together every thing that is most valuable in each, together with all else that his own indefatigable researches, or the zeal of enlightened co-operators, may furnish him with. He intends to print the original text in all cases, annexing French translations to documents not written in French.

The two first volumes contain what M. Pardessus, for want of a more definite expression, has termed customs or usages. The list is too long to give in detail; but their nature may be guessed when we say, that included in it will be found the Compilation of Wisby, the Rolls of Oberon, the Consulate of the Sea, the Naval Law of the Rhodians, the Customs of Amsterdam, the Maritime Ordinances of the Hanseatic League,



&c. in fact, all authentic bodies of maritime regulations, where-soever existing, which have ever exercised the force of law without being directly traceable to a law-maker. The three last volumes (the work is to consist of five) will contain the positive maritime laws of all countries down to the end of the seventeenth century.

“Compelled (says the Editor) to prescribe myself a limit, I have thought it best to terminate this collection at the end of the seventeenth century, the latter years of which were signa-lized by the publication of the ordinance of Louis XIV. (August, 1681,) become in some sort the common law of Europe. It is not that since this epoch, and especially at the commencement of the present century, maritime legislation has not made great steps towards perfection in many states. But all the laws made during this interval have been no longer what may be termed sources, antiquities; they have re-produced or perfected what existed antecedently; they form the actual law, which I shall publish in its turn in another collection, which will form a natural continuation of this. This second collection, for which I solicit aid no less than for the present, will be, if I may use the expression, a work of pure practice, whilst that which I am now publishing has a scientific and historic end, of which the utility, and even the necessity, are incontestible.”

It is unnecessary to expatiate on the profound and varied learning required for an undertaking of the sort, for no one doubts that M. Pardessus is fully equal to the task; but aid and co-operation are more than ever necessary, as the French government is said to have withdrawn its support. The work was commenced during the reign of Louis XVIII., and prosecuted during that of Charles X., under the avowed patronage, and we believe at the expense, of the crown. M. Pardessus was attached to their dynasty, and did not change his opinions with the times. The consequence is, that, instead of being as formerly a Counsellor of the Court of Cassation and Professor of Commercial Law, he is now a simple member of the Institute: instead of being cheered by royal favour, all sort of official countenance is withdrawn from him. With this, so far as M. Pardessus is personally and individually concerned, an English public has no business to concern itself; but we really

cannot see why the completion of a work on Maritime Antiquities should be made to depend on the sort of political ultraism the author may happen to profess. He will hardly infect the *Consolat de Mar* with his heresies, or shake the throne of the citizen king with the Compilation of Wisby. Some idea of the sort, however, seems constantly uppermost with the French; for a plan or inquiry set on foot by one government is hardly ever continued by the next, however general and unconnected with politics the purpose of it. A Report on English Criminal Law, for instance, drawn up by a French jurist, dispatched for that purpose by the Duc de Broglie during a *doctrinaire* ministry, would infallibly be thrown aside as useless by the movement party, without the slightest reference to its accuracy or tone. It would therefore not at all surprise us to find that the same narrow-minded course of proceeding has been extended to M. Pardessus.

Besides this compilation, M. Pardessus is the author of a work entitled *Elemens de Jurisprudence Commerciale*, and of the most finished course of commercial law (*Cour de Droit Commercial*) that has ever been published. To the later editions a complete catalogue raisonnée of all works on commercial jurisprudence has been annexed. "Such a catalogue (says M. Dupin) had never been undertaken before in France, nor even in Germany, where the exactitude and patience of the learned have been exercised with so much success, not simply on law in general, but also on a great number of particular subjects."

H.

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ART. VIII.—REGISTRATION UNDER THE REFORM ACT.

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*The Law and Practice of Elections, as altered by the Reform Act, &c.* by Charles F. F. Wordsworth, Esq. of the Inner Temple. London. 1832.

THE Registration under the reform act is now in progress. At the period of our publication, the revising barristers will be at their work very generally throughout the country. We cannot, therefore, until another quarter, present our readers with the practical information we expect to gather from our

professional friends on the subject of their new vocation. We have already prognosticated many difficulties in this process; and all such as presented themselves to our minds have been faithfully propounded, with the view of smoothing the way for our official brethren, so far as lay within our power. Should we prove to have been too liberal in our misgivings, this very good intention must plead our excuse, and we shall rejoice to find our anticipations incorrect. At present, however, from a nearer view of the approaching period of revision, connected with some information which has reached us on the subject of the overseers' lists already published, we feel rather confirmed than shaken in the belief, that in many places great confusion will attend the perfecting of the registers of voters, both in counties and boroughs.

The effect of the system upon the voters themselves seems to have been precisely what we expected and have prophesied. In places where the electioneering spirit is already awake, a too great acrimony in objecting, availing itself of the facility of that process, has entailed a great mass of hardship on the legitimate voters, while, in other places, where that is not the case, the laxity and indifference of all parties has operated at once to the exclusion, by reason of non-claim, of persons entitled to the franchise, and the admission of persons not entitled, from the want of objection. The former evil has been much aggravated in counties, by the necessity of a voluntary claim, and the check produced upon such claim by the shilling tax, without which the notice will not be valid. It is not so much the expense as the offensive necessity of troubling themselves to this extent, which has prevented many respectable persons from applying to be registered. In boroughs, where the registration is compulsory, the levy of the shilling along with the poor-rates from every person registered, will be found still more offensive, and undoubtedly lead to the question whether a man can object to his own insertion on the list. It is curious, moreover, that the imposition does not reach those electors in virtue of the old rights, who, though not resident within the limits of a borough, are reserved on condition of residence within seven miles. The officers of the parish within which such a person resides have clearly no authority under the act to levy the election shilling. Borough

voters residing within extra-parochial limits will find, of course, the same immunity.

By far the greatest mischief, however, seems to have arisen from non-compliance with the directions of the act on the part both of claimants and overseers, sometimes from ignorance and inattention, and sometimes from the extreme difficulty of judging how to act. Mis-descriptions and omissions are said to abound greatly in the county lists, and to promise, even in the absence of objections and claims, ample employment for the revising barrister to alter, where he can obtain the requisite information, and in the absence thereof to expunge. Much diminution of the constituencies may be expected from this source, when it is considered how many claimants do not know that it is necessary to set out their Christian names at full length: if in the notice of claim the initial only is found, and no one is there to say whether J. means John, or James, or Joshua, or whether R. means Robert, or Richard, or Reuben, it will be imperative on the barrister, by sections 42 and 50, to expunge the vote, although there has been no objection, and consequently no notice of objection to the party. On the other hand, the grossest want of right in the party claiming, will not, without some omission like that above described, of the Christian name, the place of abode, the nature of the qualification, or the local description of the property, justify the reviser in rejecting the vote, unless objection have been made in due form. The case has been mentioned to us of a person resident in Rutland (in which county the revision has already taken place), who claimed to vote for Rutland in right of a freehold, stated in the claim itself to be situate in Lincolnshire. There was no objection made to him, and no such omission in his claim as to entitle the barrister to expunge him of his own motion; and for Rutland he will vote the next election. At this rate a man might acquire the franchise by possession of a cow or a pig, if he were to claim in proper form, and no one made objections; for the sheriff, with his three questions at the poll, would have no power to shake him, when once registered, provided he continued in possession of the same pig. It would seem even that by giving one's parrot both a Christian name and a surname, one might make a plausible claim for him, to which no one should object,

the individual and his principles being alike unknown to all parties. On coming to the poll, the monosyllables "yes" and "no," and the name of his candidate, are all he will require in order to pass muster,—for example:

*Return Off.* Are you the same person whose name appears as Peter Jacko on the register of, &c.?

*P. Jacko.* Yo-a-es.

*Ret. Off.* Have you already voted, &c.?

*P. Jacko.* Knoagh.

*Ret. Off.* Have you the same qualification, &c.?

*P. Jacko.* Yo-a-es.

After thus creditably acquitting himself, who would be so barbarous as to put poor Jacko to the bribery oath? Even were that done, he might, by dint of a good education, respond, and with more safety than many Christians, "I do swear." All that remains is,

*Poll Clerk.* Whom do you vote for, sir?

*P. Jacko.* Sir Bellyful Gobbletax; a plumper.

*Sir B. G. (bowing and removing his hat).* Thank you, sir, thank you.

In this manner may ladies of rank in the Tory faction usefully employ themselves in the manufacture of constituents, taking advantage of the Whig blunders to repair the ruin done to the constitution by the Whig reform. Let the latter look to it. We hear of many animals of the above description being already in a state of proficiency quite surprising. More serious evil, however, seems likely to arise from the loss of real, than the creation of undue, constituency. Misdescription of the property in respect of which they claim to vote, has occurred very much among such county voters as have not chosen to resign the matter into the hands of the agents of candidates already in the field, a practice from which every honest elector should shrink, who feels himself worthy to retain to the last moment the free custody of his own opinion. One of the most common mistakes has arisen from the mention of the word "rent-charge," in the form of the notice of claim given by the act. The farmer paying a rent of 50*l.* a year, sees this word in the form of a notice, and not having read "Blackstone's Commentaries," or "Littleton's Tenures," thinks it is the proper description of an occupation for which

his landlord *charges* him a *rent* of 50*l.*; especially as that which would be the true description of this new franchise has been omitted in the enumeration of the modes of qualification. The barrister, with no evidence of a mistake before him, leaves the vote as it is, being on the face of it a good one; but, on coming to the poll, the third question of the returning officer, viz. "Have you the same qualification for which your name was originally inserted in the register, &c.?" places the claimant *hors de combat*.

Still more sweeping and fatal in its effects is a practice, which we understand to have been adopted in some boroughs, of publishing promiscuously in one list, the voters entitled under the new rights, and those entitled under the old ones; the act having imperatively required the publication of a distinct list of each class. The franchises created and reserved in the earlier sections of the act, are invariably accompanied with the condition of being registered "according to the provisions hereinafter contained." Whether by a non-compliance with those provisions, the register, when produced at the poll, will be considered invalid in respect of the names so improperly entered and published by the overseers, will be a question, in all probability, for the ultimate decision of a Committee of the House of Commons. We have been told that very high authorities of the anti-reforming persuasion have expressed themselves against the legality of such votes. It seems doubtful where the objection should be taken; probably before the returning officer, against the register *pro tanto*, when produced as evidence of the votes at the poll; but opportunity will also occur before the barrister, to whom, it should be contended, no jurisdiction belongs over lists produced by the overseers, which are not "so made out as aforesaid;" see section 50. Should the barrister allow the objection (which, in *favorem suffragii*, we think he ought not to do,) at all events the list should seem good for one of the two classes contained in it; electing to which class (the more numerous of course) he should apply it, he might decline to revise the other class, as not contained in a separate list. The directions of the act are so explicit on this point, that there is no excuse for overseers who have departed from them; and if mischief comes of it, indictment or the action for the penalty should be made their reward.

Upon the whole, the sources of disfranchisement connected with the machinery of registration are so various, and so likely, as regards many of them, to operate extensively; and so serious is the degree of evil likely to result therefrom, when considered with reference to a most important object expressed in the preamble of the act, namely, the extension of the suffrage; that we feel disposed, in addition to the points already touched in this article, to recapitulate shortly, and present at one coup-d'œil, certain other causes of disfranchisement connected with the register, most of which have already on former occasions been pressed upon the attention of our readers.

The proportion of 10*l*. householders disabled every year by want of a sufficient length of occupation, demonstrated in our 14th Number to be nine-fortieths of the whole.

Difficulties about the payment of rates and assessments, in accordance with the requisitions of the act.

Indifference on the part of many persons entitled to claim, justified by the trouble thereof and the shilling tax.

Difficulty of producing evidence of title; witnesses not being compellable to come, or to answer, when sworn.

Impunity of objectors objecting on no grounds.

Proof of qualification thrown on claimant.

County voters deterred by distance from the enforcement of their claims.

Expense of litigation on questions of doubtful value in the boroughs.

The short period for which the barrister's decision avails; and the possible yearly recurrence of the same expense and trouble, where there is no immediate prospect of an election, far less a contested one. The present year is favourable to the amount of registration, as affected by this circumstance.

Wrong judgment of overseers or claimant himself as to the list, whether county or borough, in which a freeholder occupying his own freehold within the limits of a borough, should be inserted.

Lastly, *unforeseen* miscarriages, arising from the unmanageableness of machinery at present new and unaccustomed to the road.

These are sources of disfranchisement, arising from registration alone; the restriction of the period of polling to two days will undoubtedly be productive of the same to a great

extent; not only from the impossibility in many places of polling the whole constituency in that time; but also from the circumstance that many county voters, having votes for counties distant from each other, will not be able to avail themselves of the franchise in each.

It was to be expected that the engrafting of the 10% householders upon the constituencies of the old boroughs would greatly increase their respective amounts; and when we see the gross numbers of the several polls taken at the next election, we shall be well able to judge whether any, and what effect the present system of registration is calculated to produce in counteracting that desirable object. Having considered this subject with much attention, we think it not too much to say, that in very many cases the constituencies will rather lose than gain in amount by the whole operation of the Reform Act. Still some system of registration we most certainly should desire, even though accompanied by all the evils of which we are at present complaining; and there is only one difficulty which prevents us entering at once into the details of a plan obviously practicable and simple, and liable to few, if any, of the objections above enumerated. That one difficulty is the want of a good trustworthy authority to decide upon the validity of the claims to vote, always present on the spot, and ready, therefore, to act up to a period very little remote from the time of the election itself. It seems to be the better opinion that justices of the peace at petty or quarter sessions, are not to be entrusted with a jurisdiction of this nature. What a reflection on magistrates entrusted with the power of transportation for life! Should the establishment of provincial courts with frequent sittings ever be effected, this difficulty, with many others, will then probably have found its proper solution.

The revising barristers, we understand, are prepared to put a bold face upon the matter, and to take John Bull by the horns; threatening, under shelter of the word "court," to commit his majesty's subjects for any contempt of their judicial presences. This is a very proper spirit, if indulged within certain limits; that is, it will be very proper, and indeed due to the dignity of the office, to think of sending people to prison, and even to express oneself to that effect; but after



all it might be an inconvenient thing to do, and therefore better not to attempt, without the aid of a constabulary force. If one has no means of imprisoning people, it is little good that one is prepared to defend an action for false imprisonment. In many places plentiful materials for combustion must exist, demanding the utmost caution and forbearance on the part of our electioneering judge; for if a spark should once fall on the right sort of stuff, Harvey's powder-mills will be a joke to it. Dwelling upon these reflections, the solitude of our chambers, unpromoted as we are, affects us with a consoling sense of security and quiet; and we incline to hug ourselves in the majesty of editorial sway, though it extend not beyond the snubbing of our own clerk, one compositor, and a couple of devils; but those, please God, we can send to — on the least disturbance.<sup>1</sup>

There is a strange fancy afloat, by no means consolatory if correct, that the action on the penalty against the barrister for a wilful contravention of the act, may be made the means of eliciting from the judge of assize a decision upon the validity of a vote; if the barrister have decided rightly, that should seem a ground of nonsuit, inasmuch as there is no contravention; if wrongly, the question of wilful contravention must then go to the jury for a verdict, and thus we shall know the opinion of the judge upon the point. This, assuming the payment of costs to the barrister, would certainly be a cheap and advantageous mode of trying a question upon which many votes depend, should it be encouraged by the judges, and would, in most cases, be resorted to in preference to the plan suggested by the act, of tendering the disputed votes at the poll, and petitioning the House of Commons on their rejection; particularly as there will usually (with the exception of this first election) be time to take the judge's opinion before the occurrence of a poll. We may calculate, however, very safely upon the agility of the bench in escaping from any such interference with the parliamentary jurisdiction. Either they will refuse to entertain the action until petition

<sup>1</sup> We think the barrister will do best to follow Mr. Speaker Onslow's example, who, having repeatedly told an obstreperous member that he should be obliged to name him, as the phrase goes, was asked—"And pray, Mr. Speaker, what will follow if you do?" "God in Heaven knows," was the reply.—*Edit.*

has been made to, the House of Commons, throwing it upon the plaintiff to show by a decision from the proper tribunal, that the barrister's judgment was wrong; or they may take it upon themselves, to nonsuit for want of sufficient evidence of the wilfulness, not touching the question of contravention, choosing rather to trench on the province of the jury, than to entangle themselves with so notable a heap of confusion as the law of franchise established by election committees.

For the purpose, however, of putting this question of jurisdiction in stronger light, let us suppose the following case:—Forty annuities are granted, all of the same date, charged upon a piece of ground barely sufficient to support the charge, by one individual, on the eve of an approaching election, or under other circumstances, on the whole compelling the conclusion that they were granted “in order to multiply voices.” By 7 & 8 Will. III. c. 25. s. 7, called the Splitting Act, such conveyances are made void. Parliamentary committees have repeatedly declared that such conveyances are good. The barrister is now called upon to decide between an act of parliament still in force and the successive decisions of parliamentary committees making that act of none effect. Suppose him to decide in favour of the act, and that, on petition, his judgment is overruled by the committee. By section 75 of the Reform Act, all laws, statutes, and usages, now in force respecting elections are retained in operation. Here, then, supposing the law of the parliamentary committees incontrovertible, a clear case of contravention of the provisions of the Reform Act is made out. Under these circumstances, should an action for the penalty be brought against the barrister, what is the course to be pursued by the judge, and in what manner will he leave the case to the jury? Will he consider the decision of the committee binding as to the question of a right or wrong construction of the act of parliament having been given by the barrister; or will he look at the act of parliament himself, and consider whether in his own judgment there has been a contravention to support the action?

Some difficulty seems already to have occurred to the revisors, from the want of proper returns by the clerks of the peace of the numbers of claims and objections in the respective parishes; whereby they have been unable with any degree

of certainty to ascertain the necessary periods of their sittings in the various polling places, of which they are required by act to give previous notice. This neglect is, probably, in no case imputable to the clerk of the peace, but to the inattention or ignorance of the overseers or constables of the hundreds, whose duty it is to forward the lists to him by a certain time. Still more serious will be the difficulty of obtaining the attendance of the overseers upon the court of revision; and a few examples of indictment will probably be found necessary to open the eyes of those officers to a true sense of their responsibility against another year. In fact, where there is much business to be done, no inconsiderable hardship will accrue to these persons in attending the court day after day, not knowing when they shall be wanted, and obliged to wait until their lists are called on. Occasionally, on the other hand, they have shown themselves too officious, and ready to bestow upon their lists more attention than the act requires of them; sometimes inserting, after the original publication, names omitted; sometimes expunging those improperly inserted, anticipating, in fact, the labours of the revisor. Even in London, where better information might have been expected to prevail, it appears that a great quantity of persons, omitted in the lists, have been allowed to make their claims verbally instead of sending a written notice, of the necessity of which the overseers should have been fully aware.<sup>1</sup>

The exclusion of counsel from attendance in the revising court seems to be a provision of doubtful expedience, if it be in accordance with the true meaning of the act that attorneys should be allowed to be of counsel for the parties; in which case the business will be conducted with less efficiency, less dispatch, and probably at an equal expense. It is said that a plan for evading this provision has been discovered by making the barrister the objector in all the cases in which he is engaged to appear; if, however, he accept fees for such employment, such practice will certainly not meet with the approval and sanction of the profession. During the two days of the

<sup>1</sup> We see in the Times the following amusing specimen of a notice of claim by a constituent of the Tower Hamlets:—

“ I hear by do declare

I have left my claim with John Ware; |

My name is Robert Harris,  
Of Shoreditch parish.”

poll, the attendance of counsel before the returning officer to argue certain questions of informality in the Register, not cognizable by the revisor, will be indispensable at every contested election; equally so will be the presence of an assessor to the returning officer; for the points likely to arise there, though few in number, will be of the greatest importance and the most difficult of solution.

Mr. Wordsworth, the title of whose treatise appears in front of this article, has made an extremely lucid arrangement of the body of election law as it now stands; giving in his Appendix a series of acts of parliament relating to elections still in operation notwithstanding the Reform Act, the Reform Act itself, the Boundary Act, and a list of the boroughs now in existence, with their respective modes of franchise and amount of population; and where we have had occasion to look minutely into his pages, we have found both correctness and completeness in the execution of the work.

We shall notice in a future article the practical result of the registration, and direct our attention to the proceedings at the poll.

*P.*

[Mr. Wordsworth has published a similar work on the Law and Practice of Elections in Scotland; Messrs. Price and Wishaw, also, have published works on the new Election Law, which are well spoken of; and Mr. Gorton has just put forth a very useful Analysis of the English, Irish and Scotch Reform Acts.—*Edit.*]

# DIGEST OF CASES.

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## COMMON LAW.

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[Containing 2 Barn. & Adol. Part 4; 3 Barn & Adol. Part. 1; 9 Bing. Parts 1 and 2; 2 Tyrwhitt, Part 2; 6 Moore & Payne, Part 1. Many of the cases in Tyrwhitt, and most of those in Moore & Payne, have been included in former Digests.]

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### ACT OF PARLIAMENT.

Where two acts passed the same session which are to come into operation on the same day, are inconsistent, that which last received the royal assent is to prevail.—*The King v. Justices of Middlesex*, 2 B. & Adol. 818.

### ADMINISTRATION.

(*Stamp duty.*) The intestate assigned all his property to the defendant, in consideration of his taking upon himself the payment of an annuity and other debts. The present action was brought by the administrator on a covenant by the defendant to indemnify the intestate against such an annuity, default having been made during the intestate's lifetime: Held, that the damages recoverable under this covenant were a part of the estate, and rendered the letters of administration liable to stamp duty. (This overrules Lord Tenterden's decision, 2 M. & M. 45 and 7 L. M. 438.)—*Carr v. Roberts*, 2 B. & Adol. 905.

And see AUTHORITY.

### AFFIDAVIT.

(*Of Debt.*) In an affidavit of debt for money paid, the omission of *at the request* is fatal. (2 B. & Adol. 571.)—*Marshall v. Davison*, 2 Tyr. 315.

### AGREEMENT.

"J. R. agrees to supply J. W. with wheat straw of good quality, delivered at his premises till the 25th June, 1830, at 33s. per load, to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order

the sum of 33s. per load for every load so delivered on his premises from this day till the 25th June, 1830:" Held, that each load was to be paid for on delivery, and that on J. W.'s refusal to pay on delivery, J. R. was not bound to send more. (6 Taunt. 154.)—*Withers v. Reynolds*, 2 B. & Adol. 882.

## APPEAL.

(*Notice.*) An appeal was formally entered as an appeal against the accounts of the churchwardens and overseers of B., but it was substantially an appeal against the accounts of the overseers: Held, that notice to the overseers was sufficient. (1 B. & Adol. 1.)—*The King v. Justices of Norfolk*, 2 B. & Adol. 944.

## APPRENTICE.

An assignment of a parish apprentice is not within 8 Anne, c. 9, requiring the sum paid to be inserted, and the instrument to be stamped within two months. (1 B. & Adol. 477.)—*The King v. Inhabitants of Ide*, 2 B. & Adol. 866.

## ARBITRATION.

(*Bond.*) The condition of an arbitration bond was, that the parties should abide by the award, so that the arbitrator made his award as to all the damages to be hereafter sustained and compensation to be thenceforth made, at the expiration of every two months from the 20th of December: Held to be imperative, and not merely directory, as to the periods of arbitration: Held also, that a memorandum agreeing to a change of day required an agreement stamp.—*Stephens v. Lowe*, 9 Bing. 32.

## ARREST.

1. (*Costs for improper.*) Where the plaintiff sued out a bailable writ on an insufficient affidavit, but the defendant was neither arrested nor holden to bail by reason of the defendant's attorney having given the sheriff an undertaking: Held, that the plaintiff was not liable for costs under 43 Geo. 3, c. 46, on his recovering less than £15. (6 B. & C. 528.)—*Amer v. Blofield*, 9 Bing. 91.
2. (*Second arrest.*) The defendant, on being arrested, procured his liberty by giving security. The security proving inadequate, the plaintiff arrested him again, but still retained the security: the Court ordered the bail-bond to be cancelled.—*Wilson v. Hamer*, 6 M. & P. 120.

ASSIGNMENT. See LANDLORD AND TENANT.

ASSIZE. See MIDDLESEX.

## ATTORNEY.

1. (*Evidence of being.*) The plaintiff, who sued for an injury to his character as an attorney of the King's Bench, gave no evidence of his having acted as such, but there was evidence of his having taken out the annual certificate, and that it had been countersigned by the Master of the King's Bench: Held sufficient. (4 T. R. 366; 5 B. & C. 38.)—*Sparling v. Haddon*, 9 Bing. 11.

2. (*Confidential communication.*) The plaintiffs sued as executors of P. who had bequeathed his property in five portions. There had been a suit in Chancery in which the plaintiff's attorneys had appeared for the parties interested in three-fifths, and the defendant's attorneys L. and W. for the parties interested in the rest. Upon affidavit of these facts, and that the defendant had no interest in the Chancery suit, a rule *nisi* was obtained to restrain S. and W. from acting as the defendant's attorneys, on the ground of their having obtained a knowledge of the plaintiff's case in their former employment; but the rule was discharged.—*Grissell v. Peto*, 9 Bing. 1.
3. (*Order of Taxation.*) The Court has a jurisdiction over an attorney's bill independently of the statute 2 Geo. 2, and may mould the order of taxation as it likes. Thus there is no objection to make an order of taxation whilst an action is depending, without the terms of an undertaking to pay the amount found to be due.—*Watson v. Postan*, 2 Tyr. 406.

#### AUTHORITY.

(*To indorse bills.*) It was proved that J. was a confidential clerk of the defendants, and had been introduced by them to their bankers as a person to whom the same attention was to be paid as to themselves; that they had recognized both bills and checks drawn by him in numerous instances; and that in three instances he had indorsed bills for them, one of which instances at least was proved to have been known to the defendants: Held sufficient to justify an inference that J. had a general authority to indorse bills.—(6 Taunt. 455; 5 B. & A. 204.)

The defendants proposed to give in evidence the letters purporting to be written by them to their bill broker, and purporting to state that J. had authority to indorse, for the purpose of showing that they were forgeries: Held inadmissible.—*Prescott v. Flinn*, 9 Bing. 19.

#### AWARD.

1. The question stated in the order of reference was, whether the defendants were entitled to set off the sum of 246*l.*, which depended on the question whether certain goods had been bought of them. The arbitrator not being able to decide the main point, but finding that a deduction of 8*l.* 12*s.* was, at all events, to be made from the 256*l.*, awarded that the defendants were not entitled to set off the sum of 246*l.* A rule to set aside the award as not being final was discharged. The plaintiff having brought an action on the award: held that the defendants could not set off the remainder of the 246*l.* deducting the 8*l.* 12*s.* the award being conclusive on the face of it, and not to be questioned in such an action.—*Johnson v. Durant*, 2 B. & Adol. 925.
2. (*Setting aside.*) The Court refused to set aside an award, in the course of which both the parties had been examined by consent, on the ground that, subsequently to the award, which was in favour of the defendant, it was discovered that the defendant had been sentenced to transportation for a felony, and had returned before his time was expired. It did not

appear that the defendant's testimony formed one of the main grounds on which the award was made.—*Smith v. Sainsbury*, 9 Bing. 31.

3. When a verdict is taken subject to a reference, and the award is not made in time, the Court will order a new trial. (4 B. Moo. 31.)—*Hall v. Phillips*, 9 Bing. 89.

#### BAIL.

1. (*Entitling affidavit.*) An affidavit in support of an application to set aside proceedings against bail, may be entitled, either in the original cause or as in an action against the bail.—*Lisle v. Chetwode*, 2 Tyr. 177.
2. (*Notice.*) The bail had justified by affidavit, but the four days' notice required by the first of the New Rules of T. T. 1831, had not been given. Held, that the plaintiff had twenty days to except to the bail as formerly.—*Goddard v. Jarvis*, 9 Bing. 88.

#### BANKRUPT.

1. The bankrupt had let a carriage hired of A. to the defendant. It was overturned by the defendant's negligence, and he returned it in a damaged state to A. who repaired it by the bankrupt's order, and proved for the amount of his charge. Held, that the defendant was liable to the assignees in nominal damages, though no dividend was paid, or likely to be paid, by the bankrupt's estate.—*Porter v. Vorley*, 9 Bing. 93.
2. (*Act of Bankruptcy.*) An act of bankruptcy, by filing a petition of insolvency, is complete when the petition arrives at its final place of destination, and not when delivered to an officer of the court.—*Garlick v. Sangster*, 9 Bing. 46.
3. (*Act of Bankruptcy by delivery of goods.*) The jury found that the goods had been delivered by the bankrupt to the defendant, in satisfaction of a *bonâ fide* debt, but voluntarily and in contemplation of bankruptcy, more than two months before the commission was issued. Held, an act of bankruptcy within 6 Geo. 4, c. 16, s. 81. (1 M. & N. 137.)—*Bevan v. Nunn*, 9 Bing. 107.
4. (*Where debt accrued before trading.*) A., not a trader, becomes indebted to B. to the amount of 100*l.* A. afterwards becomes a trader and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader he commits an act of bankruptcy. Held, that B. can support a commission against him upon this debt and act of bankruptcy. (In the Lords.)—*Bailie v. Grant*, 9 Bing. 121.
5. (*Liability of provisional assignee.*) The provisional assignee of a bankrupt is not liable for the misconduct of an agent appointed without any undue negligence on the part of the assignee.—*Raw v. Cutten*, 9 Bing. 96.
6. (*Trading.*) A female gained her livelihood by letting lodgings, receiving lodgers for long or short periods. She supplied them with provisions if required, on which she charged a profit, but the provisions so found did not form any general stock of her own, but were kept separately for the individuals for whom they were procured. Held, that she thereby became subject to the bankrupt laws.—*Smith v. Scott*, 9 Bing. 14.



7. (*Appointment by.*) By settlement, lands were conveyed to the use of the husband for life, with power of appointment to the sons of the marriage, remainder to trustees to preserve, &c.; remainder, in default of appointment, to the sons successively in tail; remainder to the right heirs of the husband. The husband became bankrupt, and the lands were sold subject to the contingencies. The husband afterwards executed a power of appointment to his son in fee after the determination of his own life estate. Held, that the son took nothing under the appointment, but took an estate tail in remainder under the settlement. *Badham v. Mer*, 6 M. & P. 14.
8. (*Wife of felon.*) The wife of a felon sentenced to transportation, but confined on board the hulks, where she visited him occasionally, is liable to be made a bankrupt if she trade on her account.—*Ex parte Franks*, 6 M. & P. 1.

#### BILL OF EXCHANGE.

1. A bill was accepted for the accommodation of the drawer, who indorsed it as a security and then became bankrupt. The indorsee entered into an agreement with the assignees as to the debt, and mutual releases were exchanged between. The indorsee was not aware when he took the bill that it was accepted for accommodation, though he was aware of that fact when he entered into the arrangement with the assignees. Held, that the acceptor remained liable to the indorsee. *Harrison v. Courtould*, 3 B. & Adol. 36.

(*Lost.*) The Court granted a rule to compute principal and interest on a bill lost since the declaration, on the production of a copy verified by affidavit.—*Flight v. Brown*, 2 Tyr. 312.

And see DESCENT.

#### BOTTOMRY.

The judgment of the Common Pleas in *Simonds v. Hodgson*, (6 Bing, 114, 3 Law Mag. 216, title Bottomry,) was reversed.—*Simonds v. Hodgson*, 3 B. and Adol. 50.

#### BRIDGE.

1. Trustees under a local turnpike act are individuals or private persons within the meaning of 43 Geo. 3, c. 59, which enacts, that no bridge built by any individual, private person, body politic or corporate, shall be deemed a county bridge, unless built under the direction or to the satisfaction of the county surveyor, &c.—*The King v. Inhabitants of Derbyshire*, 3 B. and Adol. 147.
2. One B. was bound *ratione tenuræ* to repair a carriage-bridge in the county of Essex. In 1736 a foot-bridge had been constructed by the trustees under a highway act alongside the carriage-bridge, to which it was fastened and by which it was principally supported. Held, that this was not to be considered part of the carriage-bridge, and that the county was liable for the repairs.—*The King v. Inhabitants of Middlesex*, 3 B. & Adol. 201.
3. (*Expenses of repairing.*) The 43 Geo. 3, c. 59, s. 5, which exempts counties from repairing bridges erected after the passing of the act, unless built under the direction of the county surveyor, or a person duly ap-

pointed, does not apply to bridges merely widened or repaired since the act.—*The King v. Inhabitants of Lancashire*, 2 B. & Adol. 813.

**BROKER.**—See EVIDENCE.

### CLERGYMAN.

(*Charge on benefice.*) A warrant of attorney by a clergyman, authorising a sequestration of his benefice, is a charge within 13 Eliz. c. 20, and void. (2 B. & Adol. 734.)—*Newland v. Watkin*, 9 Bing. 113.

### COMPOSITION.

The plaintiff, a surgeon, had sued one of the members of the committee of a charitable institution for his bill. The defendant in that action offered to pay a certain sum and costs, on condition of receiving a discharge, which was agreed to. The money was paid and the action dropped: Held, that this composition did not operate in discharge of the other members as to the remainder of the debt. (5 East, 230; 10 B. & C. 329.)—*Walters v. Smith*, 2 B. & Adol. 889.

And see **PROMISSORY NOTE**, 2.

### CONTRACT.

(*Rescinding.*) The plaintiffs (brokers) were employed by H. to buy certain oil for him. They applied through one B. to the defendants, who refused to deal with the plaintiffs until they were told that there was an unnamed principal, upon which they sold the goods, and notes were interchanged describing the transaction as between the plaintiffs and defendants. The plaintiffs afterwards, under H.'s authority, sold the oil to another person; whereupon H. declared that he would have nothing more to do with the matter, to which the plaintiffs assented: Held, that the defendants were notwithstanding bound by their contract.—*Short v. Spackman*, 2 B. & Adol. 962.

### CORPORATION.

1. The judgment of the Common Pleas in *Henley v. Corporation of Lyme Regis*, (5 Bing. 91; 2 L. M. 85, tit. Corporation, 3); was affirmed.—*The Mayor, &c. of Lyme Regis v. Henley*, 3 B. & Adol. 77.
2. By 43 Geo. 3, c. 56, certain persons, and their successors, were appointed guardians of the poor in C. and trustees for putting the act into execution. Eight were to go out of office yearly, and their places to be supplied by persons elected by the inhabitants. They were empowered to take conveyances of land to themselves and their successors, and to be sued and sue in the name of their treasurer. A. was treasurer for several years. During his trusteeship a certain sum of money was paid to him under a decree of the Court of Chancery out of funds devised to the poor of the city of which C. was a part. That sum he paid over to the guardians, who expended it. By a subsequent decree of the Court of Chancery he was required to pay back that sum, to be applied in a different manner. He paid the amount, and brought the present action against the present treasurer, his successor, to recover it: Held, that the action was maintainable. The principal objections were, that the guardians were not a cor-

puration, and that the payment by A. was in his own wrong.—*Jeffrys v. Garr*, 2 B. & Adol. 832.

3. An act of parliament, incorporating a gas light company, provided that its affairs should be managed by eighteen directors, and gave power to make by-laws, *under seal*, for the regulation of the directors, &c. At a meeting of the company, a resolution was passed for allowing each director a guinea for each attendance: Held, that no action was maintainable against the company by a director for a payment under this resolution.—*Dnnston v. The Imperial Gas Light Company*, 3 B. & Adol. 125.

COUNTY. See BRIDGE.

#### COVENANT.

1. By indenture, reciting that a power to dispose of the premises was vested in A., he conveyed them to B., and covenanted that the power was in force and unexecuted, and also that he (A.) had good right, title, &c., and further, that the premises should be held and enjoyed without the let or interruption of A., or any claiming under or in trust for him: Held, that the last covenant was general and not limited to acts done by A.—*Smith v. Compton*, 3 B. & Adol. 189.
2. A covenant to deliver up a mill, "with all fixtures, fastenings or improvements, reasonable use and wear only excepted," was held to include a pair of new mill stones set up in the mill by the tenant, although the custom of the country authorised the removal of them. (1 Taunt. 19.)—*Martyr v. Bradley*, 9 Bing. 24.
3. A., B. and C. covenanted with D., E. and C. (the same person) for the payment of an annuity to E. and his wife. The deed was signed by A., B. and C. only: Held, that after the death of C., D. and E. might sue upon it. The objections were that D. and E. had not signed the deed, and that C. was both covenantor and covenantee.

The consideration was in consideration of the covenants thereafter entered into by D., E. and C.: Held, that the non-execution by D. and E. was not a total failure of consideration.—*Rose v. Poulton*, 2 B. & Adol. 822.

CUSTOM. See WEIGHTS AND MEASURES.

#### DECEIT.

A bill was presented for acceptance by A., a clerk of the payee's, in the absence of the drawee. The defendant, who lived in the same house with him, and had formerly been his partner, on the refusal of A. to leave the bill, wrote on the bill an acceptance as by the procuration of the drawee, with the view of saving expense and in the belief that the bill would be sanctioned. It was afterwards indorsed over to the plaintiffs, who, on the drawee's repudiating the acceptance, brought the present action against the defendant as for a deceit. The jury negatived all fraudulent intent; but the Court held that the defendant was notwithstanding liable, as he had virtually given out that he had authority to accept, which was untrue, and a fraud in law. It was held, that the defendant was not liable as acceptor.—*Polhill v. Walter*, 3 B. & Adol. 114.

## EJECTMENT.

1. (*Recognizance.*) The 1 Geo. 4, c. 87, s. 1, which requires the tenant to enter into recognizances where the term or interest "shall have expired or been determined either by the landlord or tenant by regular notice to quit," does not apply to the case of a tenant holding over after surrender.—(7 B. & C. 2; 1 D. & R. 540.) *Doe dem. Tindal v. Roe*, 2 B. & A. 922.
2. (*Service.*) A rule was refused where the notice was directed to the wrong person, though served on the tenant in possession.—*Doe v. Roe*, 2 Tyr. 280.
3. (*Production of consent rule.*) The only case in which it is necessary to produce the consent rule at the trial, is when the plaintiff directs his proof to certain premises, and the other party contends that he does not defend for those. In ordinary cases the production is not necessary.—(1 M. & M. 237.) *Doe dem. Greaves v. Raby*, 2 B. & Adol. 948.

## ERROR.

- (*Costs.*) The 10 Car. 2, st. 2, c. 2, s. 10, which gives double costs "for the delaying of execution," was held not to apply to a case where the attorney for the plaintiff in error had paid the damages and costs in the Court below to the attorney for the other party, before the writ of error was sued out, giving notice to him to retain the money in his hands.—*Wright v. Fairfield*, 2 B. & A. 959.

## EXECUTION.

- (*Priority of Extent.*) The following two questions were propounded for the opinions of the judges in the House of Lords:—First, a common person brings his action against another and obtains judgment, issues a writ of *fiери facias* upon that judgment, and delivers the writ to the sheriff, who, in execution thereof, seizes the goods of defendant. While the goods remain in the sheriff's hands, and before he has sold them, a writ of extent in aid is issued against the same defendant as debtor of a debtor of the crown, tested after the seizure under the *fiери facias*, and is delivered to the said sheriff—shall this writ of extent be executed by the sheriff, by extending the same goods, seizing them into the king's hands, and selling them to satisfy the crown's debt, without regard to the writ of *fiери facias* under which he had first seized them? Secondly, all other things remaining the same, does it make any difference whether the writ of extent was in chief or in aid? The first question was answered in the affirmative by Patteson, Alderson and Taunton, Js., Vaughan and Bayley, Bs., Tindal, C. J. and Lord Tenterden, C. J.; in the negative, by Gaselee and Littledale, Js. All the judges were agreed that the second question must be answered in the negative. The case occupies 157 pages.—(*In the Lords.*) *Giles v. Goover*, 9 Bing. 128.

## EXECUTOR.

1. The will was proved in May, and after paying certain debts, the executor (the defendant) made over the residue to the residuary legatee: Held, that he had not allowed a reasonable time for the claims of creditors, and that

the payment to the residuary legatee was not a defence to a subsequent action by one of them.—(1 Esp. 275; 1 Meriv. 265.) *Davis v. Blackwell*, 9 Bing. 5.

2. An executor may enter up judgment on a verdict obtained by his testator in libel.—(17 Car. 2, c. 8.) *Palmer v. Cohen*, 2 B. & A. 966.

### EVIDENCE.

(*Contract in Writing*.) The 6 Geo. 4, c. 94, s. 2, enacts that any person intrusted with and in possession of any bill of lading under a contract, &c. shall be deemed the true owner, &c. so far as to give validity to any contract, &c. thereafter made by such person. A broker in possession of certain India warrants, pledged them without authority to B. In an action brought by the owner for the proceeds against B., the broker, who was called as a witness, stated that he pledged them under a contract in writing: Held, that B. was bound to prove the agreement by this written contract.—*Evans v. Truman*, 2 B. & A. 886.

And see ATTORNEY. AUTHORITY. NOTICE TO PRODUCE.

### FOREIGN JUDGMENT.

It is no valid objection to a foreign judgment that the party was absent from the country when the proceedings were instituted against him; the law of the country being, that the procurator-general or his deputy was bound to take care of the interests of an absent party, though no means were provided by which the procurator-general or his deputy might be required to communicate with such party.—(9 East, 192; 1 Stark. N. P. 525.) *Becquet v. MacCarthy*, 2 B. & A. 951.

### FORMER RECOVERY.

The plaintiff declared in debt for rent and money had and received. From his particular it appeared that he sought to recover the proceeds of certain stone taken by the defendant. Before the trial he commenced an action of trover for the stone. On the trial of the first action, he only gave evidence on the count for rent, and obtained a verdict: Held, that he was not barred from recovering for the stone in the second action.—*Hadley v. Green*, 2 Tyr. 390.

### GAME:

A qualified person was held not liable to any penalty for having in his possession partridges and pheasants, killed before the 1st February, 1830, on the 9th of February in that year.—*Simpson v. Unwin*, 3 B. & Adol. 134.

### HIGHWAY.

1. (*Liability of surveyor*.) A surveyor of highways was held liable for paring a fence belonging to the plaintiff and taking away a portion of the soil to increase the width of a road to twenty feet, under 13 Geo. 3, c. 78, s. 15, though the property was improved thereby.—*Alston v. Scales*, 9 Bing. 3.
2. Where by an Act of Parliament trustees are empowered to make a road from one point to another, the whole must be finished before the public are liable for repairs. In the case in question, eleven miles and a half were

completed out of twelve. Littledale, J. doubted.—*The King v. Inhabitants of Cumberworth*, 3 B. & Adol. 108.

And see BRIDGE.

INSOLVENT. See BANKRUPT, 2.

### INSURANCE.

(*Stranding*.) Where the event happens in the ordinary course of navigation, as from the flux and reflux of the tide, without any external force, it is not a stranding, but where it arises from an accident, it is. In the present case the ship had grounded in a manner to injure her cargo, in consequence of the stretching of a rope by which she was kept in her position: Held by Lord Tenterden, C. J., and Littledale and Taunton, Js., that this was a stranding. Parke J. dissented. (7 B. & C. 219.)—*Wells v. Hopwood*, 2 B. & Adol. 20.

### INTERPLEADER ACT.

1. The power given by the Act (1 & 2 Wm. 4, c. 58,) is discretionary, and the Court will not interfere in favour of a defendant who has voluntarily placed himself in a situation to be sued.—*Belcher v. Smith*, 9 Bing. 82.
2. The Interpleader Act does not extend to a case where the defendant has a legal claim.—*Braddick v. Smith*, 9 Bing. 84.
3. The Court granted an interpleader under 1 & 2 Wm. 4, c. 58, applied for by the sheriff of London, on an affidavit that the sheriff had seized the goods of the defendants at the suit of the plaintiff, and that he had received notice from the petitioning creditor that a commission of bankrupt had been sued out previously to the levy, and a provisional assignee appointed.

The Court suspended the question of costs, in order that they might confer with the King's Bench.—*Northcote v. Beauchamp*, 6 M. & P. 158.

### JUDGMENT.

The Court of King's Bench has no power, even by consent, to alter their judgment of a preceding term, though the record on which the former judgment was given has been amended in the interim under an order of judges of oyer and terminer.—*The King v. Carlile*, 2 B. & Adol. 971.

### LANDLORD AND TENANT.

1. The principle is, that a tenant shall not contest his landlord's title; if he objects to such title, he should give back the possession to his own landlord. He cannot put another person into possession.—*Doe dem. Manton v. Austin*, 9 Bing. 41.
2. The plaintiff assigned, by indenture indorsed on the lease, certain premises and his term therein, "subject to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and contained in the indenture of lease:" Held, that the assignee was liable in covenant to the lessee, for rent which the lessee was compelled to pay after the assignee had assigned over. (Doug. 764; 5 B. & C. 589.)—*Steward v. Wolveridge*, 9 Bing. 60.

## LEGACY DUTY.

The testator, born in Scotland, died in India, leaving no assets in England.

The executors having obtained an Indian probate, and converted the property into money, invested it, prior to the payment of residuary legatees, in the English funds: Held, that no legacy duty was payable.—*Jackson v. Forbes*, 2 Tyr. 354.

**LIBEL.** See **EXECUTOR**, 2.

## LUNACY.

(*Costs.*) An application to tax an attorney's bill for lunacy business must be made to the Lord Chancellor, even after action on the bill. The Court of Exchequer did not decide the question whether such a bill be taxable at all.—*Jones v. Bywater*, 2 Tyr. 402.

## MALICIOUS PROSECUTION.

The judgment of the Common Pleas in *Taylor v. Williams*, 6 Bing. 183 and 512, and Law Magazine, Vol. III, 232, was affirmed by the King's Bench.—*Taylor v. Williams*, 2 B. & Adol. 845.

## MIDDLESEX.

Under 55 Geo. 3, c. 50, abolishing liberte fees, the justices at quarter sessions, subject to the approbation of the judges of assize, are authorized to award compensation to the sheriff or undersheriff: Held, that the justices of Middlesex have power to award compensation to the sheriff, the judges of K. B. and C. P. being judges of assize for Middlesex.—*The King v. Justices of Middlesex*, 3 B. & Adol. 100.

**MODUS.** See **TITHES**.

**MORTGAGE.** See **TITLE DEEDS**.

## NEWSPAPER.

(*Who printer.*) The defendants, being proprietors of a newspaper, had made arrangements with the plaintiff for printing it. One S. was to use the plaintiff's types and men in his printing office at a certain price for every thousand papers. S. was named as printer at the end of the paper, and had filed the usual affidavit at the stamp office; Held, that S., and not the plaintiff, was the printer of the paper responsible to the stamp office within 38 Geo. 3, c. 78.—*Bagster v. Robinson*, 9 Bing. 77.

## NOTICE TO PRODUCE.

On the Monday, the day when the Chelmsford Assizes commenced, about seven o'clock in the evening, notice was given to produce a particular deed. The adverse attorney, who had already been to London for other deeds required to be produced, said that the deed was in London, but that he would fetch it if the party requiring it would pay the expenses of the journey. No offer to this effect was made. The cause was appointed for Wednesday, but was not tried till Thursday following: Held, that secondary evidence of the deed was not admissible.—*Doe dem. Curtis v. Spitty*, 3 B. & Adol. 182.

## NUISANCE.

The keeper of a ground for pigeon shooting was indicted for the nuisance occasioned as well by the shooting and the collection of idle people brought together thereby, as by the persons who waited on the outside of the ground for the purpose of shooting the pigeons that flew off, who, it was proved, occasioned great damage and apprehension in the neighbourhood: Held, that he was liable for the nuisance thus occasioned. (3 Camp. 226.)

—*The King v. Moore*, 3 B. & Adol. 184.

## PARLIAMENT.

An action of debt lies against one of the petitioners for costs incurred in opposing a petition against the return of a member of parliament, such petition having been declared frivolous and vexatious under 9 Geo. 4, c. 22.—*Gurney v. Gordon*, (in the Exchequer Chamber,) 9 Bing. 37.

PARTIES. See COVENANT, 2.

## PARTNER.

An action was held maintainable against one of several partners, who, without their concurrence, promised to admit the plaintiff into the firm, he being thereby induced to give up a lucrative employment.—*M'Neil v. Reid*, 9 Bing. 68.

## PARTY-WALL.

The plaintiff being tenant of certain land, upon which he had built a party-wall, let a portion of it to the defendant, upon an agreement that the defendant should build a dwelling house upon it, and take a lease. The defendant, in building the house, used the party-wall. A lease was granted him, and he subsequently underlet the premises at an advanced rent: Held, that the defendant was not liable as owner of the improved rent, under 14 Geo. 3, c. 78, for a portion of the expense of the wall built by the plaintiff. (5 T. R. 130; 7 Taunt. 158.)—*Williams v. Pocklington*, 2 B. & Adol. 878.

PIGEON SHOOTING. See NUISANCE.

## PLEADING.

1. In replevin the defendants made cognizance in respect of the arrears of an annuity; the plaintiff pleaded that no memorial was enrolled; the defendants replied that a memorial of all the deeds, &c. was enrolled, and, after setting out the memorial, concluded with a *prout patet per recordum*: Held, that this conclusion was proper. Held, also, that a judgment on a warrant of attorney, being one of the securities, need not be mentioned in the memorial.—*Richardson v. Tomkins*, 9 Bing. 51.
2. (*Variance*.) The declaration stated a promise by the defendant to pay for certain goods supplied to her as she should be able. The proof was, that the goods were supplied to her when she was a feme covert, separated from her husband, and that she promised to pay after his death: Held, that the goods were in law supplied to the husband, and that the promise was consequently not stated with sufficient correctness. Lord Tenterden, C. J., added that the doctrine that a moral obligation is a sufficient con-



sideration, must be received with some limitation.—(5 Taunt. 36; 3 B. & P. 249, n.) *Littlefield v. Shee*, 3 B. & A. 811.

3. (*Where de injuria, &c. pleadable.*) An avowry in replevin stated that the plaintiff was an inhabitant of the parish of A., rateable to the relief of the poor in respect of his occupation of a tenement; that a rate was duly made and published; that by such rate the plaintiff was duly rated in a certain sum; that the collector (the defendant) gave him notice; that he was duly summoned at the petty sessions; that a warrant was issued and delivered to the defendant, who justified under it. Plea, *de injuriâ, &c.*: Held, by Parke and Patteson, Js., Lord Tenterden, C. J., *diss.*, that the plea was good. Lord Tenterden dissented on the ground that it put too many matters in issue.—*Selby v. Bardon*, 3 B. & A. 2.

#### PONE.

The cause assigned in a writ of *pone* for removing a plaint is mere form, and not traversable.—(8 Bing. 71.) *Parke v. Renton*, 3 B. & A. 105.

#### POOR.

1. (*Emancipation.*) An idiot is not emancipated by coming of age and being separated from his father's family.—*The King v. Inhabitants of Cowarne*, 2 B. & A. 861.
2. (*Certificate.*) A. devised to B. his son, a certificated pauper, as follows: "I give to B., my son, the sum of 5*l.*, and my desire is, that my son B. shall live in that part of my house as he now doth, and at the same yearly rent which he now gives, as long as my son J. shall enjoy or own the same:" Held, that B. took a determinable estate for life, which discharged the certificate.—*The King v. Inhabitants of Cassington*, 2 B. & A. 874.

#### POOR RATE.

(*Canal Property.*) A canal company, having no interest in the soil, is not rateable in respect of a dam by which a river is rendered navigable.—(9 B. & C. 820.) *The King v. The Aire and Calder Navigation*, 3 B. & A. 139.

#### POST OFFICE.

A postmaster, who delivered letters addressed to a bankrupt to his assignee, in the conviction that it was his duty so to do, was held not liable, under 9 Anne, c. 10, s. 40, for wilfully and knowingly detaining letters, &c.—*Meirelles v. Banning*, 2 B. & Adol. 909.

#### POWER.

A devise authorized the demising of the premises for the purpose of new building or effectually rebuilding and repairing any messuage, house, &c. thereon. The lease in question purported to be in consideration of the great charges the lessee would be at in effectually repairing, &c. and contained a covenant to expend a certain sum in effectually repairing, &c.: Held that, *effectually repairing* being different from *rebuilding*,<sup>1</sup> the power

<sup>1</sup> Johnson's Dictionary was cited in argument, where *rebuild* is explained as meaning "to re-edify, to restore from demolition, to repair."

was not pursued; and Parke and Taunton Js. seemed to think that a covenant to expend a limited sum was not equivalent to a general covenant to repair effectually.—*Doe dem. Wymoke v. Withers*, 2 B. & Adol. 896.

### PREBEND.

An archdeacon of Rochester instituted and inducted, is thereby instituted and inducted into the prebend attached to the archdeaconry; and the Court granted a *mandamus* to the dean to administer the oath. (1 B. & Adol. 761.)—*The King v. The Dean and Chapter of Rochester*, 3 B. & Adol. 95.

### PRACTICE.

1. (*Particulars.*) The particulars annexed to the record under the New Rules, differed from the particulars delivered under a judge's order. The objection was taken at the trial, but the defendant, not being prepared to prove the delivery of the first particulars, did not apply for a nonsuit. The Court granted a new trial without costs.—*Morgan v. Harris*, 2 Tyr. 385.
2. (*Judgment as in case of nonsuit.*) In the Exchequer, prior to the New Rules, the defendant must have given four days notice of motion for judgment as in case of nonsuit; but there was no Rule calling on the plaintiff to enter the issue as in the King's Bench.—*Coatsworth v. Martin*, 2 Tyr. 169.
3. (*Delivery of plea.*) Where a plea was delivered at the office of the plaintiff's attorney before judgment was signed, but after the time was out, and the attorney notwithstanding signed judgment, the Court set it aside.—*Amphlitt v. Semple*, 2 Tyr. 312.
4. (*Suit in name of trustee—judge at chambers.*) The assignee of an insolvent *cestui que trust* has no right to sue in the name of the trustee on a mere tender of indemnity: he must apply to the Court, that the master may decide on its sufficiency. An order to stay proceedings ought not to be made at chambers.—*Spicer v. Todd*, 2 Tyr. 172.
5. (*Venire de novo.*) The Court refused to grant a *venire de novo* on the ground that the jury had been convened by the partner of the attorney for the plaintiff; it not being shown that the defendant was taken by surprise at the trial. *Brunskill v. Giles*, 9 Bing. 13.
6. (*Concurrent writs.*) A *ca. sa.* and a *fi. fa.* may issue, but cannot be executed, concurrently.—*Hodgkinson v. Walley*, 2 Tyr. 174.
7. (*Security for costs.*) A motion to compel a party to give security for costs should be preceded by an application to him. (1 B. & Ald. 331.)—*Adams v. Brown*, 9 Bing. 81.
8. (*Costs at Chambers.*) A judge at chambers may make the payment of costs a part of his order. But see 2 B. & Adol. 415, *ante*, p. 209; Practice, 6.—*Doe dem. Prescott v. Roe*, 9 Bing. 104.
9. (*Order to put off trial.*) Where an order to put off a trial is made by agreement on a peremptory undertaking to try at the following assizes,

the order need not be made a rule of Court.—*Jones v. Pritchard*, 2 Tyr. 383.

10. (*Relation of new rules.*) The rules of Hilary term, 2 Wil. 4, are not retrospective; and where the plaintiff had gained two trials before these rules: Held, that he was entitled to the costs of both and also to the costs of entering up judgment *nunc pro tunc*, though the rule for that judgment was not made absolute till after the rules came into operation.—*Carlisle v. Garland*, 9 Bing. 85.
11. (*Setting aside proceedings.*) Execution was sued out without delivering a copy of the bill of costs or giving a day's notice of taxation: Held, that after ten days' delay and the bankruptcy of the defendant intervening, it was too late to apply to set aside the proceedings for irregularity.—*Rutledge v. Giles*, 2 Tyr. 169.
12. (*Verifying returns.*) A town clerk, &c. may verify his return by affidavit, where the estreats do not amount to £5.—*Ex parte Tomlins*, 2 Tyr. 176.
13. (*Where the defendants sever in defence.*) At the trial of an action against two defendants, the defendant's counsel suggested that one of them had pleaded, *puis darrein continuance*, a plea of his bankruptcy and certificate, to which the plaintiffs had demurred generally. This plea not being on the record, the judge refused to take notice of it, and tried the cause. It appeared that issue had been joined in Michaelmas term preceding the trial, and that the record was passed and notice of trial given for the sittings after that term. Continuances were entered down to the 23d of May, the first day of Trinity term. The certificate was allowed on the 14th May, and the plea pleaded on the 5th June as of Trinity term, and the demurrer filed on the 24th June. There was no joinder in demurrer. The trial was on the 24th June, 1831. The jury having given an absolute verdict against the other defendants, the Court set it aside for irregularity, on the ground that the jury should have been summoned to try the issue as to one only, and assess contingent damages against the other.—*Thompson v. Perceval*, 2 B. & Adol. 968.
14. (*Inspection of deed.*) An annuity deed was prepared by one R. and left in his hands. There was no counterpart. Within two years after the annuity was granted, the defendant, the grantor, redeemed it by paying the amount of the consideration money to R., who thereupon delivered up the deed to him. In an action by the grantee against the grantor (the defendant) the Court permitted the former to inspect and take a copy of the deed.—*Devernor v. Bouverie*, 6 M. & P. 29.

And see TRESPASS.

#### PROMISSORY NOTE.

1. A note was given to an outgoing tenant in payment of the price of crops, &c., conditioned on the land being given up on the next day. Proof was given of a refusal the next morning, but the defendant's cattle were seen on the land the same day and continued there: Held, that the jury might conclude that the land was given up.—*Evans v. Morgan*, 2 Tyr. 396.

2. A. gave a promissory note payable to B., (for which A. had received no consideration,) as a security for goods to be sold to B.; and B. indorsed the note to the creditors. B. afterwards executed a deed of composition, by which it was stipulated that the creditors should not be prevented from suing on securities: Held, that A. was not thereby discharged.—*Nichols v. Norris*, 3 B. & Adol. 41, note.

#### PURCHASER.

(*Within 27 Eliz.*) By a post-nuptial settlement B. conveyed to the plaintiffs, as trustees for his wife, certain property, the title-deeds of which he afterwards obtained from them, and deposited with the defendants as a security for money advanced: Held, that the defendants were not purchasers within 27 Eliz. c. 4, and that the plaintiffs were entitled to recover the deeds.—*Kerrison v. Dorien*, 9 Bing. 76.

#### RELEASE.

The general words of a release are qualified by the recital. Thus where the release recited that disputes were subsisting between A. and B., about which actions had been brought, and that it had been agreed that each of them should execute a release of all actions, causes of action, claims and demands, brought by him against the other: Held, that the release must be confined to actions then depending. (4 M. & S. 425; 2 B. & B. 38.) —*Simons v. Johnson*, 3 B. & Adol. 175.

#### SALE.

A., in England, sent orders to B. and C. (the plaintiffs,) in Russia, for the purchase of corn, directing them to draw upon E. and Co., and also on H. in London. A. subsequently cancelled the orders. B. and C., however, shipped a quantity of corn to A.'s account, and wrote to him to say that they hoped he would approve what they had done, notwithstanding the countermand. They drew upon him for part of the amount, and forwarded an unindorsed bill of lading, on which the goods were stated to be for his order and on his account, and they drew upon H. for the remainder, and forwarded an indorsed bill of lading to him. The bills were dishonoured; A. subsequently confirmed his revocation, and B. & C. gave notice to the agent of H. that they should retain the wheat; A. afterwards induced the master of the vessel to deliver the wheat to his order, and not to H. according to the indorsed bill of lading: Held, that the shipment did not vest the property absolutely in A., but only on condition of his accepting the bills, and that the plaintiffs were consequently entitled to recover the value of the wheat in an action against the master. *Brandt v. Bowley*, 2 B. & Adol. 932.

#### SCHOOL.

A grammar school was founded and endowed by letters-patent from Philip and Mary, in which it was provided that the master of the school and two guardians of the lands of the school should be chosen by, and the said school be altogether of the patronage and free disposition of, the founder and his heirs: Held, that the right of appointing the master and guardians

was in point of law capable of alienation.—*The Attorney-General v. The Master, &c. of Brentford School*, 3 B. & Adol. 59.

### SETTLEMENT.

(*Renting.*) The pauper rented a house consisting, (besides other rooms) of a garret extending over the lower rooms in the adjoining house; he afterwards took the adjoining house of the same landlord, paying 4s. a week for the whole. There was no internal communication, the whole being under one roof: Held, that a settlement was gained within 6 Geo. 4, c. 57, which requires that the tenement shall be a separate and distinct dwelling-house or building to confer a settlement.—*The King v. Inhabitants of Macclesfield*, 2 B. & Adol. 870.

### SHERIFF.

(*Interpleader Act.*) Where goods had been taken by the sheriff under a *fi. fu.* and sold, and another *fi. fu.* issued in the mean time, and a third party (L.) claimed the property against the plaintiffs, the sheriff, and the person against whom the *fi. fu.* were sued out, the Court directed the rule under 1 & 2 W. 4, c. 58, to be drawn up as follows:—"That the plaintiffs have liberty to defend the action brought or to be brought against the sheriff by L., to abandon their or his claims or claim in the event of their or either of their declining to defend within one week next ensuing; and that the sheriff be at liberty to appear on the trial of the said cause by himself or his counsel, to protect his own interests; the sheriff hereby undertaking to pay to the plaintiffs respectively the amounts of their respective executions in the event of L. failing in his action."—*Slorman v. Buck*, 3 B. & Adol. 103.

### TITHES.

The lord of the manor exercised a right in the nature of right of common along with other landowners on a waste, of which the soil was vested in himself. An inclosure act directed that an allotment should be made to the lord in respect of the soil, and to him and the other claimants in respect of their rights of common: Held, that a modus for all rights of common extended to the allotment made in respect of the quasi right of common enjoyed by the lord, the legislature having treated it as a right of common in the act. (1 Ves. 115; 5 B. & A. 22.)—*Askew v. Wilkinson*, 3 B. & Adol. 152.

### TITLE DEEDS.

One A. in 1803 conveyed an estate to B., who in 1812 conveyed it to C., and C. sold it in 1826 to the plaintiff. A. did not deliver up the title deeds, and was sued by C. during his ownership, who recovered a judgment in trover for the deeds, but the judgment was not docketed. In 1825, A. mortgaged the property, and delivered the deeds to the mortgagees: Held, that the plaintiff, the legal owner, was entitled to the deeds without paying the mortgage money. (6 Taunt. 12.)—*Harrington v. Price*, 3 B. & Adol. 170.

## TRESPASS.

1. (*Costs.*) *Tresspass quare cl. fr.* Plea, not guilty and a right of way. Replication joined issue on the first plea, traversed the right, and new assigned. The defendant joined issue on the traverse, and suffered judgment by default as to the trespasses newly assigned. The jury found for the plaintiff on the general issue, and for the defendants as to the issue on the right of way, and assessed the damages on the new assignment at 1s.: Held, that the defendant, not having withdrawn the general issue, was not entitled to the general costs of the trial. (3 Br. & B. 117; 1 B. & C. 278; 5 Bing. 199.) *Broadbent v. Shaw*, 2 B. & Adol. 940.
2. A person hired by a company to navigate a fly-boat (their property) at weekly wages, may maintain trespass for an injury to the tackle. (1 Salk. 10.) *Moore v. Robinson*, 2 B. & Adol. 817.

## TURNPIKE TOLLS.

By a turnpike act the following toll was imposed: "For three or four horses, &c., drawing any coach, &c. 1s." By another section, it was provided that no person should pay toll more than once on the same day for passing or repassing with the same horses, cattle, beasts, or carriages, &c. but that every person after having paid such toll once as aforesaid, and producing a note or ticket denoting the payment of such toll, should afterwards pass with the same horses, cattle, beasts, and carriages, toll free during the day: Held, that the exemption did not apply, unless, at any rate, the horses were the same; and Taunton, J. thought that it did not apply except for the same horses drawing the same carriage. (See the cases on this subject collected Law Mag. 2 vol. 126.) *Hopkins v. Thorogood*, 2 B. & Adol. 916.

## UNIVERSITY.

The Cambridge Paving Act (28 G. 3,) authorised a rate to be levied on the tenants and occupiers of all tenements &c. within the town, and directed two-fifths to be paid by the University. Downing College was built, since the act, on land within the town, which had not before paid paving rate: Held, that the college was liable only as part of the University.—*Downing College v. Purchase*, 3 B. & Adol. 162.

## WEIGHTS AND MEASURES.

A custom for the jury of a manor to enter houses in which goods are sold by weight and measures, and search for, seize and destroy false weights and measures, is a lawful custom. In a plea justifying under such a custom, it is enough to aver that the weights &c. were found by the jury to be false. The Court leet was adjourned from the 28th of April till the 15th of December, to enable the jury to make their presentments. Held, not unreasonable, being according to the custom.—*Willcock v. Windsor*, 3 B. & Adol. 43.

## WELSH JUDGMENT.

Execution was allowed to issue on a judgment of the Great Sessions of Caernarvon, signed before 11 G. 4, & 1 W. 4, c. 70, without taking out a summons before a Baron to correct the suggestion continuing the proceedings in the Exchequer.—*Rees v. Rees*, 2 Tyr. 384.

## EQUITY.

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(4 Bligh, Part 3 ; 5 Russell, Part 1 ; 1 Russell & Myln, Part 4 ; 3 Simons, Part 4.)

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### ACT OF PARLIAMENT.

(*Construction of local act.*) By the Bedford Level Act, the commissioners for drainage appointed under the act were empowered to purchase and make satisfaction for lands and damage done; but if any persons refused, after notice, to treat or accept satisfaction, then the commissioners were to apply to two magistrates to issue their warrant to the sheriff to summon a jury to ascertain the amount of the purchase money or satisfaction. And it was further provided, that if the landowners and the commissioners could not agree as to the compensation for damages done by the commissioners, the same were to be ascertained by a jury to be impanelled and returned as aforesaid: Held, that in that case the owners, and not the commissioners, were to apply to the magistrates.—*In re Eau Brink Drainage*, Sim. 435.

### ADMINISTRATOR.

An administrator does not lose his right of retainer, by paying the assets into Court. And where the fund in Court is insufficient to discharge his debt, his right of retainer will prevail against the plaintiff's right to have the suit satisfied.—*Chisum v. Dewts*, R. 29.

### ADVANCEMENT.

A son, entitled to £4000 at the death of his father on the bond of the latter given on the marriage of the former, having overcharged his account with a partnership, in which he, his father, and other persons were partners, to the extent of £19,000, the father took upon himself the son's debt: Held, that this assumption of the son's debt was to be deemed an advancement of the £4000.—*Ansley v. Bainbridge*, R. & M. 657.

### AGENT.

W. holding title deeds as an equitable security for a debt due to him from N., and being also solicitor of S., to whom N. owed a sum of money, for which S. held other securities; N. wrote a letter, which was left at the office of W., stating that he, W., out of the proceeds of the sale of the property, of which he held the title deeds, was to receive the amount both of his own debt and of the debt due to S.; afterwards W. received from N. the amount of his own debt, and without the sanction of S. delivered up the title deeds in his possession to N., who sold the property, received the

purchase money, and did not pay any part of it to S.; *Semble, W.* is in point of law liable to S. for any loss which S. may thus sustain.—*Attwood v. ———*, R. 149.

#### AGREEMENT.

An agreement for the purchase of a house was written by the defendant, his own name being stated in the third person, as "Mr. W. P. has agreed:" Held, that the contract was good within the statute of frauds, which only requires that the party sought to be charged, shall, by writing his own name, have attested his entering into the contract.—*Proper v. Parker*, R. & M. 625.

#### ALIEN.

Under the treaty of 1794, between Great Britain and America, and the act of 37 Geo. 3, c. 97, American citizens who held lands in Great Britain on the 28th of October, 1795, and their heirs and assigns, are at all times to be considered, so far as regards their lands, not as aliens, but as subjects of Great Britain.—*Sutton v. Sutton*, R. & M. 665.

#### ANNUITY.

1. A testator by his will made in Ireland, prior to the 6 Geo. 4, c. 79, bequeathed an annuity, and died domiciled in England, after the act was passed: Held, that the annuity was to be paid in Irish currency. *Holmes v. Holmes*, R. & M. 660. [The act declared the currency of Great Britain to be the currency of the whole United Kingdom.]
2. Where a testator directed an annuity to be purchased for his wife within a given time, and she consented to postpone the time of purchase, and died before a purchase, her executors were held to be entitled to the gross sum which would have purchased it; the gift of an annuity is considered equivalent to a personal legacy of a certain sum of money. (*Yates v. Compton*, 2 P. W. 308; *Palmer v. Craufurd*, 3 Swans. 482.)—*Dawson v. Hearne*, R. & M. 606.

#### ASSIGNMENT.

In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund in question; a direction to pay generally, with an intimation that the creditor has a claim upon the fund, is not sufficient. (*Yeates v. Groves*, 1 Ves. 280; *Ex parte Smith*, 6 Ves. 446.)—*Watson v. The Duke of Wellington*, R. & M. 602.

#### BANKRUPT.

A testator gave a sum of stock to A. for life, and after his decease to his children, with a proviso that the life interest of A. should not be subject to any alienation or disposition, by sale, mortgage, or otherwise, in any manner whatsoever; and in case he should charge, or attempt to charge, affect or encumber the same, that such mortgage, sale, or disposition, should operate as a complete forfeiture thereof, and the same should devolve upon the persons in expectancy: Held, that the clause of forfeiture applied only to the prohibition against the acts of the parties themselves,



and that on A.'s bankruptcy his interest passed to the assignees. (*Cooper v. Wyatt*, 6 Madd. 482; *Yarnold v. Moorhouse*, R. & M. 364.)—*Lear v. Leggatts*, R. & M. 690.

### CHARGE,

Whether a sum directed to be raised out of the "rents and profits" of a real estate is to be raised by the annual income, or by sale or mortgage, is a mere question of intention, to be collected from the context of the will, or from the purposes to which the money is to be applied, as whether those purposes require the immediate payment of the money or not.—*Wilson v. Halliley*, R. & M. 590.

### CHARITY.

1. (*Acceptance of Gift*.) A charitable institution accepting an annuity given to it for ever, cannot afterwards renounce it; and a direction that the annuity should be applied in another manner, in case the charity should neglect or refuse to comply with the conditions of the gift, was considered as not authorizing that neglect or refusal, but as a collateral remedy to secure, in all events, the testator's intention. (*Attorney-General v. Christ's Hospital*, 3 Bro. C. C. 163.)—*Attorney-General v. Christ's Hospital*, R. & M. 626.
2. (*Lapse*.) Where a sum is left for charitable purposes, the gift shall not be declared void for uncertainty as to what charity is meant, but the Court will direct it to be applied to charitable purposes. (*Mills v. Farmer*.)—*Simon v. Barber*, R. 112.
3. (*Lapse*.) Where a testator gives a legacy to a charitable society which has ceased to exist before his assets can be administered, the Court will execute his intention *cy pres*.—*Haytes v. Tugo*, R. 113.

### CHILDREN.

When the general description of children will include legitimate children, it cannot be extended to illegitimate children. As where a testator bequeathed the residue of his property to all and every the children of J. M., W. M. and S. B., an illegitimate child of W. M. was held not to be entitled. (*Wilkinson v. Adam*, 1 Ves. & B. 454; *Harris v. Lloyd*, 1 T. R. 310.)—*Bayley v. Mollard*, R. & M. 581.

### COLLEGE ELECTIONS.

Where the statutes of a college directed certain officers to be elected by the president and the majority of the fellows, the concurrent voice of the president was held to be necessary in all such elections. (*The King v. Catherine Hall*, 4 T. R. 233.) *In the matter of Queen's College, Cambridge*, R. 64.

### COMMISSION OF REVIEW.

A commission of review is not a matter of right, and will not be granted unless there has been error in law, or there has been an important and doubtful question of law, which it is fit to have settled in the most solemn form, or there has been a clear mistake as to a fact.—*Dew v. Clarke*, R. 163.

## COSTS.

1. (*Creditor's suit.*) Where on a bill by a simple contract creditor for the administration of a testator's assets, the estate turned out insufficient for the payment of the specialty creditors, the plaintiff's costs were refused. (*Young v. Everest*, R. & M. 426.)—*Rowland v. Tucker*, R. & M. 635.
2. (*Assignee of Mortgagor.*) The assignees of an insolvent mortgagor will not be entitled to costs in a suit for foreclosure, though they by their answer disclaim, and say that, if applied to, they would have released the equity of redemption.—*Collins v. Shirley*, R. & M. 638.
3. (*Solicitor.*) An award, subsequently made a rule of Court, directed the costs of certain parties to be paid out of the fund. A part of the costs had been incurred in the proceedings in a case sent to law, and the rest consisted of the ordinary costs of the person who acted as the solicitor, and of fees and disbursements to the clerk in Court, whom he employed on behalf of his clients. Upon proceeding to taxation, it was discovered and objected that this person, although an attorney at law, had never been a solicitor of the Court of Chancery; and the Master thereupon disallowed the whole of the bills, with the exception of the sums paid to his clerk in Court. This taxation was confirmed on appeal. *Prebble v. Boyhurst*, R. & M. 944.
4. (*Solicitor.*) After the taxation and payment of a plaintiff's costs, it was discovered that his agent in the cause had never been admitted as a solicitor; an order was made referring it back to the Master to review his report, and disallow all items, except those consisting of fees paid to the clerk in Court, with a view of having them refunded. *Coutes v. Hankyard*, and *Sumner v. Ridgway*, R. & M. 746, 748.
5. (*Executors.*) Where a bill sought either to charge the surviving executors of a testator personally with a demand, or to have the debt paid out of the assets of the testator, and the Court decided that the surviving executors were personally liable: it was held, that the representatives of a deceased executor were entitled to have the bill against them dismissed with costs.—*Bradley v. Heath*, Sim. 560.
6. (*Security for costs.*) A foreigner, claiming to be a creditor of the testator in the cause, petitioned to have his claim referred to the Master after he had made his report: the Court made the order, upon his giving security for costs.—*Drever v. Maudesley*, R. 11.
7. (*Trustee.*) A person named a trustee without his knowledge, and never in any manner acting in or accepting the trust, being afterwards made a party to a suit respecting the trust, is entitled to his costs as between solicitor and client.—*Sherratt v. Bentley*, R. & M. 655.

## CROSS REMAINDERS.

A testator devised an estate to the use of all and every his daughter and daughters and the heirs of their bodies, as tenants in common, and for default of such issue, to the use of his own right heirs: Held, that it being manifest that the testator intended that no part of the estate should go over, unless there were a failure of issue of all the daughters, it followed that the daughters took cross remainders.

Where there is a gift to two and the heirs of their bodies, cross remainders will be implied, although there is no expressed intention that no part of the estate should go over until failure of issue of both, unless the limitation be successively, severally, or respectively, and then the remainders over will be several and respective. (*Comber v. Hill*, 2 Strange, 969; *Watson v. Foxon*, 2 East, 36.)—*Livesey v. Harting*, R. & M. 636.

#### DECREE.

A second incumbrancer filed a bill in Grenada, to which the mortgagor and first incumbrancer were defendants, impeaching one of the deeds under which the first incumbrancer claimed, and praying that the equity of redemption of the mortgaged premises might be sold. By a decree made in that suit, the Court in Grenada declared the impeached deed void, the effect of which was to reduce considerably the claim of the first incumbrancer, who appealed to the privy council, who reversed the decree of the Court. Before that suit was finally concluded, the mortgagor filed a bill here against the first incumbrancer for redemption, praying that the same deed might be declared void which had been affirmed by the privy council: Held, that the decree of the privy council could not be impeached in the latter suit, and the bill was dismissed with costs.—*Farquharson v. Seton*, R. 45.

#### EXECUTOR.

1. (*Liability*.) B. having died indebted to G. for work done, his executors signed the following memorandum on the back of the accounts:—"G. having covenanted to wait for payment of the within account, we, as the executors of B., engage to pay G. interest for the same at 5 per cent. until the same is settled:" Held, that the executors were personally liable to pay the debt and interest. *Bradley v. Heath*, Sim. 543.
2. (*Breach of trust*.) When a testator empowers three executors to lend money on personal security, he must be taken to rely upon the united vigilance of the three in respect to the borrower; it is therefore a breach of trust in two to lend money to the third.—*Walker*, R. 7.

#### EXEMPTION OF PERSONAL ESTATE.

Personal estate may be exempted from the payment of debts, without express words, if the intention of the testator be clear. *Dawes v. Scott*, R. 32.

#### FELONY.

Personal property, not belonging to a felon sentenced to transportation, at the time of his conviction, but which accrued to him afterwards during the term of his transportation, is forfeited to the crown, as, until the term of his transportation has expired, he is not restored to his civil rights. (*Bullock v. Dodds*, 2 B. & A. 258.)—*Roberts v. Walker*, R. & M. 752.

#### FOREIGN JUDGMENT.

A foreign judgment is not examinable in the courts here. Therefore a bill for a discovery, and a commission to examine witnesses abroad, in aid of the plaintiff's defence to an action brought in this country on a foreign

judgment, is demurrable. (*Galbraith v. Neville*, 1 Doug. 6; *Tarleton v. Tarleton*, 4 M. & S. 20.)—*Martin v. Nichols*, Sim. 458.

## LANDLORD AND TENANT.

The lessee of a mill and steam engine covenanted to repair, excepting reasonable wear and tear. He added to the mill, and removed and disposed of all the old machinery, except the fly-wheel, fly-wheel shaft, boiler and two cisterns, to which he attached a new engine of greater power. An injunction was granted to restrain the assignees of the lessee, who had become a bankrupt, from removing the parts of the new building, and the new parts of the engine, subject to an action to be brought by the lessors to try the right. (*Penton v. Robart*, 2 East, 88.)—*Sunderland v. Newton*, Sim. 455.

## LEASE.

If a leasehold interest is assigned by way of mortgage, the assignee takes subject to all the covenants and obligations of the original lessee.

B. N. having an interest in lands, held subject to head rents under the Bishop of Kilmore, for terms of years, renewable on payment of fines, granted under leases at certain rents, and subject to fines for renewal; and he covenanted with his several lessees to renew the under leases as often as he obtained renewals from the see of Kilmore, paying head rents and renewal fines. The interest in the under leases having become vested in R., he assigned them to trustees, to secure an annuity payable to F.; the trust being first to pay the rents and fines and then the annuity. The interest of B. N. in the leaseholds was mortgaged, and sold under a decree of foreclosure, and finally assigned to H., who also obtained an assignment of the interest of R. in the under leases as a purchaser under a commission of bankruptcy. Subsequently the annuitant filed a bill for a sale and payment of the annuity, subject to the head rents only; and afterwards, the leases having expired, he filed a supplemental bill, praying that they might be renewed upon reasonable terms. The Master, under the decree, found that the rents and fines paid by H. and the lessees under the bishop, were a charge upon the land prior to the annuity, and this report was eventually confirmed.

In such a case the covenant does not run with the land, but is personal; the right under the lease to deduct the rent and fines is not merged by the union of the principal and under leases in the same person. *Haig*, app., *Homan*, res., Bligh, 380.

## LEGACY.

1. (*Appropriation*.) Where the amount of a testator's debts is contingent, and depends upon the result of legal proceedings before a foreign tribunal, which are not likely to be speedily settled, the Court, in administering his assets, will not direct an appropriation of the fund in Court here to answer pecuniary legacies, subject to such demands as creditors may eventually establish. (*The King v. Mainwaring*, 2 Price, 67.)—*Thomas v. Montgomery*, R. & M. 729.

2. (*Contribution.*) Where a testator directs his real and personal estate to be converted into money, and the mixed fund to be applied to certain stated purposes, the real and personal estate must contribute in proportion to their relative amounts, and if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes being undisposed of, belongs, as far as it is composed of real estate, to the heir, and, as far as it is composed of personal estate, to the next of kin. (*Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Attorney General v. Winchelsea*, 3 Bro. C. C. 373.)—*Roberts v. Walker*, R. & M. 752.
3. (*Satisfaction.*) T. P. bequeathed to trustees £10,000, in trust to pay the interest to his daughter for life, or until she married. Provided, that when she married, one moiety should be paid to her husband, and the interest of the other moiety to herself, for her life, and after her decease the principal to her children. The daughter having married during A.'s lifetime, he settled £10,000 in trust for her for life, and after her decease, in trust for her husband for life, and after the death of the survivor, for their children, as they should jointly appoint, and in default of such appointment, as the survivor should appoint, and in default of appointment in trust for the issue of the marriage, and in failure of issue, in trust for the issue of A. living at the death of the survivor of the husband and wife: Held, that the settlement was a satisfaction of the legacy. (*Hartop v. Whitmore*, 1 P. W. 681; *Exp. Pye*, 18 Ves. 140.)—*Platt v. Platt, Sim.* 503.
4. (*Lapse.*) A testator gave the residue of his estate to trustees, in trust to pay the dividends to A. for life, and after his death to transfer the money to B. and C. equally, and in case either B. or C. should die before his share became payable, without leaving issue, his share to go to the survivor. B. died in the testator's lifetime, without leaving issue: Held, that there was no lapse, but that the whole went to C. (*Watling v. Baine*, 3 P. W. 118; *Humberstone v. Stanton*, 1 Ves. & B. 385; *Walker v. Main*, 1 J. & W. 1.)—*Humphreys v. Howse*, R. & M. 639.
5. (*Produce of real estate.*) The gift to one of a sum of money, part of the produce of a real estate directed to be sold, followed by a gift of the residue of the purchase money to others, is substantially a gift of the estate, and not a gift of legacies with a collateral charge upon the estate; the gift, therefore, is adeemed by the sale of the estate by the testator during his lifetime. (*Hancox v. Abbey*, 11 Ves. 179; *Arnald v. Arnald*, 1 Bro. C. C. 401.)—*Newbold v. Broadknight*, R. & M. 677.

#### LIEN.

1. A lien was established against the produce of a West Indian estate, in respect of supplies furnished to the estates, upon an agreement implied from the course of dealing and the conduct of the parties.—*Simond v. Hibbert*, R. & M. 719.
2. A. conveyed an estate to B. in consideration of B. entering into the covenants contained in the deed for paying an annuity to A. and a sum of money to other persons in the event of B. marrying: Held, that the cove-

nants did not create a lien on the estate. (*Winter v. Lord Anson*, 1 Sim. & Str. 434.)—*Clarke v. Royle*, Sim. 499.

### LIS PENDENS.

In a creditor's suit the debts and costs were paid by the sale of one of two devised estates, and the Master was directed to settle the proportion which was to be borne by the other estate. The devisee of the first estate, who was tenant for life only, being a poor and ignorant man, no further proceedings were had until after his death, twenty-six years subsequently, when the other estate had been sold. On a bill by the remainder-man of the first estate, to charge the purchaser of the other with the proportion which it ought to have contributed towards the debts and costs; the Master of the Rolls made a decree accordingly, on the ground of *lis pendens*, which amounted to an equitable notice of the charge. The decree was reversed by the Lord Chancellor, on the ground, that at the time of the purchase there was no *lis pendens* of which the purchaser was bound to take notice. (*Worsley v. Earl of Scarborough*, 3 Atk. 392.)—*Kinsman v. Kinsman*, R. & M. 617.

### LUNATIC.

1. (*Married woman*.) A married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock, which was standing in the name of a trustee for her; this stock was, under an order made in the lunacy, transferred into the name of the accountant general in the matter of the lunacy, and part of it was afterwards sold out, and applied in payment of the costs; the lunatic died, leaving his wife him surviving: Held, that the stock had been reduced into the possession of the lunatic, and that the wife was not entitled to it by right of survivorship.—*In the matter of Jenkins*, R. 183.
2. (*Commission*.) The Court will not interfere touching the property of a person of unsound mind, where no commission of lunacy has issued.—*Exp. Ridgway*, R. 152.
3. (*Allowance*.) An allowance out of a lunatic's estate will be directed for his illegitimate children, but not for their mother.—*Exp. Haycock*, R. 150.
4. (*Property*.) Where a lunatic has specifically bequeathed property by a will made while he was of sound mind, the Court will not order it to be sold, although the Master has reported it to be for the benefit of the estate.—*S. C.*

### MAINTENANCE.

A testator directed the interest of the residue to be paid to his wife, for the maintenance and support of herself and children until the death of her father, when it was to cease, and to accumulate for the benefit of the children, (it being understood that the father by his will had made ample provision for his wife and children after his decease); and the testator directed the accumulation to be transferred to his children when the youngest attained the age of twenty-one, with benefit of survivorship, on any

of them dying under twenty-one; provided that if any of them died under twenty-one leaving issue, such issue was to be entitled to the deceased parent's share; with a bequest over, in case all the children should die under twenty-one without issue. The testator died in the lifetime of his wife's father, who died without having made any provision for the children. The Court refused an allowance for their maintenance and education out of the residuary fund in the hands of the executors, notwithstanding the consent of the legatees over; on the ground that other claimants might by possibility come into existence, whose rights ought not to be affected.—*Kime v. Welfitt*, Sim. 533.

### MORTGAGE.

1. The unexpired term in a house, and the goodwill of a business established in it, were sold in a creditor's suit, with the consent of a person with whom the lease had been deposited as a security, and brought a price less than the amount of his debt: Held, that the equitable mortgagee was entitled to the whole of the purchase money, whether arising from the value of the goodwill, or from the value of the lease independently of the goodwill.—*Chissun v. Dewes*, R. 291.
2. A., by will, bequeathed to S. certain leasehold premises for the residue of a term. The premises, together with other premises, were subject to a mortgage for monies which had been raised and charged upon them by the testator, who had also given his bond for the debt. Upon a bill by legatees against the executors to carry the trusts of the will into execution, and a decree for taking the accounts, it appeared that S., who was one of the executors, had paid off the sums due upon the mortgage out of the personal estate, which was insufficient to satisfy all the debts and legacies. The payment was held to have been properly allowed by the Master. (*Serle v. St. Eloy*, 2 P. W. 386; *Ancaster v. Mayer*, 1 Bro. C. C. 454.)—*Davies*, app. *Bush*, res. Bligh, 305.

### PATENT.

A clerical error in the enrolment of the specification of a patent will be amended.—*In re Edmund*, R. 44.

### PERSONAL REPRESENTATIVES.

1. The words "personal representatives," unless controlled by the context of the will, mean executors and administrators.—*Saberton v. Skells*, R. & M. 587.
2. J. S. appointed executors, who proved his will in the Prerogative Court of Canterbury. M., the surviving executor died, having appointed W. and N. his executors, who proved his will in the Prerogative Court of Landaff: Held, that the claim of representation was complete, notwithstanding the will of the executor was not proved in the same court with the will of the original testator, and that W. and N. were the representatives of J. S. (*Wandford v. Wandford*, 1 Salk. 299.)—*Fowler v. Richards*, R. 39.

### PLEADING.

1. (*Parties*). An insolvent mortgagor ought not to be made a party to a

- suit for foreclosure, although his assignees disclaim all interest in the equity of redemption.—*Collins v. Shirley*, R. & M. 638.
2. (Answer.) The original bill sought to set aside an appointment on the ground of fraud. The amended bill inquired as to the mode in which the appointment was executed and attested: Held, that the plaintiff's case proceeded on the ground that the appointment was valid at law, but invalid in equity; and that as the only effect of an answer to these inquiries would be to show that the appointment was not good at law, they were irrelevant.—*Codrington v. Codrington*, Sim. 519.
  3. (Parties.) To a bill for redemption, all the *cestui que trusts* interested in the produce of the estate as residuary legatees under the mortgagee's will, are necessary parties, although they are numerous and the trustees have power to give discharges. (*Calverley v. Phelps*, 6 Madd. 229.)—*Osbourn Fallows*, R. & M. 741.
  4. (Plea.) Where the plaintiff by their bill claimed to be entitled to an estate as the co-heirs *ex parte materná* of R. T., the defendants pleaded "that L. M. was the heir of A. *ex parte paterná*." *Semle*, that such a plea is good.—*Everson v. Harland*, Sim. 490.
  5. (Parties.) A father devised freeholds and copyholds, charged with annuities and legacies, to his son, who died intestate, and a trader. On a bill by creditors of the son for the payment of their demands out of the estate, the annuitants and legatees ought not to be made parties.—*Parker v. Fuller*, R. & M. 656.
  6. (Parties.) To a bill for a commission to ascertain boundaries, all persons having any interest in the property are necessary parties. (*Baring v. Nash*, 1 Ves. & B. 551; *Speer v. Crantes*, 2 Mer. 410.)—*Bayley v. Best*, R. & M. 659.
  7. (Plea.) To a bill by A. claiming estates, either as heir *ex parte materná* of G. the party last seised or as a remainder-man under the limitations of some prior settlement; charging that he had only a life estate, as would appear, if the contents of a certain deed, executed in 1730 and within the power of the defendants, were set forth; and praying besides discovery in aid of an ejectment, the removal of outstanding terms, and other relief: a plea, that in 1766, G. being then tenant in tail in possession, duly suffered a recovery of the estates in question to the use of himself in fee, and subsequently devised them to the defendant, but taking no notice of the deed of 1730 and not stating any part of its contents, was overruled. (*Evans v. Harris*, 2 V. & B. 361.)—*Hangate v. Gascoigne*, R. & M. 698.
  8. (Plea.) A plaintiff claiming as heiress at law of L., who had devised estates to various persons in tail, with reversion to his own right heirs, alleged by the bill that no valid recovery was suffered of the estates, and that, if it were, the plaintiff was entitled, in the events which had happened, as the right heir of L.; and that so it would appear if the defendant would set forth the particulars of the recovery alleged to have been suffered, and of the deed declaring the uses thereof, and would produce the same. A plea, setting forth the substance of the deed, making the tenant



to the *præcipe* and declaring the uses of the recovery, (under which the plaintiff had no title,) was held a good defence, though not supported by an answer. *Plunkett v. Cavendish*, R. & M. 713.

#### POWER OF APPOINTMENT.

1. By a marriage settlement, a fund was vested in trustees, in trust, after certain life interests, for all and every the children of the marriage, in such shares and proportions, at such age or ages, time or times, and with such benefit of survivorship or otherwise, or subject to, with, or under such conditions, restrictions and limitations over, as the wife, if she survived her husband, should appoint. There was a daughter, the only issue of the marriage. The wife, who survived her husband, appointed the fund to the daughter for life, and after her decease to such persons as the daughter should appoint, and in default of appointment to the executors and administrators of the daughter: Held, that an only child was as much comprehended under the words of the power as if there had been more children than one; and that the power was well executed.—*Bray v. Hammersley*, Sim. 513.
2. A. having power to appoint 700*l.*, to be raised under the trusts of a term by deed or will, by her will appointed that sum "in trust" to her executors, whom she directed to apply the same accordingly. She then bequeathed all her personal estate to the same persons in trust, subject to the payment of her debts and legacies: Held, that the 700*l.* ought to be raised and applied in the same manner as the testatrix's personal estate.—*Goodere v. Lloyd*, Sim. 538.

#### PRACTICE.

1. (*Exceptions.*) The 8th of the new orders applies only to exceptions; and if the plaintiff afterwards amend his bill, the defendant is entitled to an order for time to answer, according to the old practice.—*Fosbrooke v. Balguy*, R. & M. 624.
2. (*Administration of Assets.*) In a suit to administer a testator's assets, if it appears that a surplus will remain after discharging all his debts and liabilities, although the amount cannot be ascertained for a considerable time, the Court will, by anticipation, direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors.—*Thomas v. Montgomery*, R. & M. 729.
3. (*Exceptions.*) If the time for referring a further answer for insufficiency upon the old exceptions, under the 6th order, has expired, it cannot afterwards be revived by referring the answer for impertinence. It is too late to object to an answer for impertinence when the time has expired, after which, by the terms of the 6th order, the answer is to be deemed sufficient.—*Jeffrey v. McCabe*, R. & M. 739.
4. (*Exceptions.*) An exception to a report in favour of a title having been allowed, leave was given to the plaintiff to go back to the Master, for the purpose of showing that a good title could then be made.—*Egerton v. Jones*, R. & M. 694.

5. (*Exceptions.*) Where a report is in favour of a title, the Court, on allowing exceptions to it, will give the vendor a reasonable time within which to remove the objections, although the exceptions and further directions were set down to come on together. (*Filles v. Hooker*, 2 Mer. 424.)—*Portman v. Mill*, R. & M. 696.
6. (*Examination de bene esse.*) A motion by a defendant, before answer, to examine a witness *de bene esse*, was granted.—*Bown v. Child*, Sim. 457.
7. (*Witness.*) A plaintiff having by mistake omitted to file a replication before he examined his witnesses, leave was given him, on motion, notwithstanding publication passed, to examine his witnesses on the interrogatories already filed; but not to examine any new witnesses. (*Cox v. Allingham*, Jacob, 337.)—*Healey v. Jagger*, Sim. 494.
8. (*Reading Answer.*) Where a plaintiff reads a passage in an answer, not referring to but qualifying a subsequent passage, the defendant may read the subsequent passage. (*Bartlett v. Gillard*, 3 Russ. 156.)—*Pende v. Whitchurch*, Sim. 564.
9. (*Taxing Costs.*) Before the new orders, where a master was directed to tax costs in case the parties differed about the same, the party claiming the costs was at liberty to take the bill of costs in the first instance into Master's office, without previously taking the bill to the other party or his solicitor.—*Aubrey v. Hooper*, R. 1.
10. (*Bill of Revivor.*) It is not necessary to bring a suit of revivor, instituted by the executors of a defendant, to a hearing, in order to make the order of revivor effectual against both the plaintiffs and the defendants.—*Pruen v. Lunn*, R. 3.
11. (*Married Woman.*) A decree may be made in a cause heard by consent, relating to the separate property of a married woman, where she and her husband were co-plaintiffs.—*Stinson v. Ashley*, R. 4.
12. (*Money directed to be laid out in Land.*) The Court can make no other order under the 7 Geo. 4, c. 45, than that, subject to the antecedent uses, the estate shall be settled to the use of such person or persons who would have been entitled to the estate tail, or their heirs and assigns.—*In re Peyton*, R. 5.
13. (*Number of Counsel.*) At the Rolls, in future, not more than two counsel will be heard on either side on a motion for the new trial of an issue.—*Rolls*, 7th July, 1828.
14. (*Supplemental Bill.*)—Where a suit in which much expense had been incurred, appeared at the hearing to be defective in form, the Court directed it to stand over, with liberty to file a supplemental bill to correct the form.—*Mutler v. Charwel*, R. 42.
15. (*Affidavit.*) Answering an affidavit is a waiver of any objection which might be taken to it, on the ground of notice not having been given that it was to be used.—*Blackman v. Glamorganshire Canal Company*, R. 151.
16. (*Production of Records.*) At the trial of an issue, the party requiring the production of a record must obtain the proper officer's attendance

with it; the Court will not order the officer to deliver it to another person.  
—*Gretham v. Bell*, R. 161.

#### PRIVILEGE FROM ARREST.

A person having been taken in execution upon a *ca. sa.* within the outer door of the Vice Chancellor's Court in Lincoln's Inn, while the Court was sitting, the Lord Chancellor ordered the officer to attend with his prisoner forthwith, and having examined the officer, discharged the prisoner immediately.—*Orchard's case*, R. 159.

#### SETTLEMENT.

By a marriage settlement stock, was vested in trustees, upon trust to pay the interest to the husband during coverture, and after his decease, in case the wife should survive, to her for life; and after her death, in case there should be any children of the marriage then living, upon trust for them as they should attain twenty-one, or marry; and in case all or any of such children should at the death of the wife be under twenty-one and unmarried, then to apply the dividends for their maintenance and education: but in case the wife should die without leaving any children at the time of her decease, or in case there should be any then living yet all of them should die under twenty-one and unmarried, then if the husband should survive the wife and all such children, to pay the dividends to him; and after the death of the survivor of the husband and wife and of the said children (if there should be any and all of them should die under twenty-one and unmarried), in trust for certain other persons. The wife survived the husband, and at her death no child of the marriage was living; but a son, who died in her lifetime, had attained twenty-one, married, and left children: Held, that the gift over was not to take place unless all the children died under age and unmarried, and that the son took a vested interest. (*Hougrom v. Cartier*, 3 V. & B. 79.)—*Torres v. Franco*, R. & M. 649.

#### SPECIFIC PERFORMANCE.

If a person, after due deliberation, enter into an agreement for the purpose of compromising a claim made *bond fide*, to which he believes himself liable, and with the nature and extent of which he is acquainted, the compromise of such a claim is a sufficient consideration for the agreement; and a Court of equity, without considering the fact of liability, will compel a specific performance.—*Attwood v. ———*, R. 149.

#### TRUST.

1. A. contracted for the purchase of certain lands, which was subject to a first mortgage to B., and a second mortgage to C., one of the terms of the agreement being, that out of the purchase money A. should retain in his hands the sum of £5010, in order to pay off these incumbrances, and by indentures of lease and release, reciting the mortgages, the estate was conveyed to him. Afterwards B., in consideration of £3220, stated to have been paid to him by A., conveyed by A.'s direction the premises to G. in fee, and it was declared, that a trustee of an outstanding term should hold that term in trust for G., to attend the inheritance. By another indenture

of the same date, and executed at the same time, reciting that W. had agreed to purchase of A. an annuity of £500 for £5000, and that the £3220 was in fact the money of W. and part of the £5000, and was paid to B. by W.'s agent at A.'s request, A., in consideration of the £3220 and of £1780, granted to W. an annuity of £500, to be issuing out of the lands; and G., by A.'s direction, demised the premises to a trustee for 500 years, upon trust to secure the rent charge: Held, that C. was now the first incumbrancer, and that W. was not entitled to the extent of the money paid to B. to have B.'s mortgage considered as still subsisting, and to have what might be payable in respect of it applied for the arrears of his annuity.—*Parry v. Wright*, R. 142.

2. Where a trust estate descended to a trustee, who refused to execute a conveyance to the *cestui que trust*, after it had been approved of by the solicitor of the trustee; the Court ordered a conveyance with costs against the defendant.—*Watts v. Turner*, R. & M. 634.

### UNDUE INFLUENCE.

A patient executed instruments, whereby he secured to the defendant, his surgeon, an annuity of £100 during the life of the defendant, in consideration that the defendant would live with and give him the benefit of his professional assistance during his life. Four days before the execution of these instruments, the defendant called in an eminent physician to visit the patient, who stated to the defendant his opinion that the patient could not recover nor live long; and about the same time the defendant expressed to a witness in the cause, that the patient could not live more than a month or six weeks: Held, that admitting the patient to have understood the nature and effect of the instruments, they could not be maintained.—*Popham v. Brook*, R. 9.

### VENDOR AND PURCHASER.

An estate sold under a decree was described as of the annual value of £55, and, by the conditions, compensation was to be made for any error in the particulars. The purchaser paid the money, was let into possession, and took a conveyance. After taking possession, he discovered that the rent did not exceed £40 per annum: Held, that he was entitled to compensation out of the purchase-money, notwithstanding the conveyance.—*Cann v. Cann*, Sim. 447.

And see **LIEN**.

### WILL.

1. (*Absolute interest*.) A testator gave all the residue of his personal estate to his wife for her own use, with a proviso, that if she should make no disposition thereof in her lifetime or by her will, it should go over to certain persons. The widow disposed of it by her will, containing no allusion to her husband's will, to persons other than those named in his will: Held, that the widow took an absolute interest in the whole of her husband's property, and that it passed by her will. (*Bull v. Kingston*, 1 Mer. 514; *Upwell v. Halsey*, 1 P. W. 651.)—*Bourn v. Gibbs*, R. & M. 614.

2. (*Wife*.) A bequest by a husband to his "beloved wife," not mentioning her name, was held to apply exclusively to his wife at the date of the will, and not to an after-taken wife. (*Waning v. Ward*, 5 Ves. 670.)—*Garratt v. Millock*, R. & M. 629.
3. (*Infancy*.) A testator devised lands to trustees, in trust at their discretion to pay an annuity to A., and to apply the rents and profits to the maintenance, education, and bringing up of the three children of A. during the life of A. The survivor of the children attained twenty-one in A.'s lifetime: Held, that the child was entitled to the rents and profits as long as A. lived. (*Alexander v. Macculloch*, 1 Cox, 391.)—*Badham v. Mee*, R. & M. 631.
4. (*Contribution*.) A testator gave three leasehold estates to three different persons, and, one of them being subject to a mortgage, directed the mortgage money to be paid off out of his residuary personal estate. The personal estate proved insufficient: Held, that the legatee of the mortgaged estate was not entitled to a contribution by the other legatees, but took the estate *cum onere*. (*Oneal v. Mead*, 1 P. W. 693.)—*Hathwell v. Tanner*, R. & M. 633.
5. (*Implication*.) A testator by his will declared that S. A. "should be his executor, to arrange, dispose of, and settle his affairs, and that he appointed him guardian to his daughter." The daughter turned out to be illegitimate: Held, that there was nothing in the will from which a bequest to the daughter could safely or reasonably be implied. (*Newland v. Shephard*, 2 P. W. 194; *Goodright v. Hoskins*, 9 East, 306.)—*Davis v. Davis*, R. & M. 645.
6. (*Construction*.) A. by will gave his residuary estate to trustees, upon trust to transfer to his great nephews and nieces, the share of the boys to be payable at twenty-one, and those of the girls at twenty-one or marriage, and to accumulate in the meantime, with benefit of accruer and survivorship; and in case of the death of all except one before their shares became vested interests, then to transfer the estate to the survivors at the age or time aforesaid. A great nephew was born after the testator's death, but before any of the others had attained twenty-one or married: Held, that there was no vesting until a boy attained twenty-one, or a girl that age or married, and that the after-born nephew was entitled to a share. (*Gilmore v. Severn*, 1 Bro. C. C. 582.)—*Balm v. Balm*, Sim. 492.
7. (*Construction*.) A testatrix directed her residuary estate to be divided into three equal shares, one share to be given to the child or children of J. M., one to the children of W. H., subtracting from their share a certain sum that W. H. owed to the testatrix, and one share to the children of R. H.; Held, that the debt was to be considered as part of the residue, which was to be divided into three equal parts, and that the debt was to be taken as a part of the share of the children of W. H.—*Murray v. Samson*, Sim. 530.

8. (*Construction.*) E. S. bequeathed to A. G., E. G., and S. L. £50 each of Bank Long Annuities then standing in her name: Held, that each of the legatees was entitled to a specific legacy of £50 long annuities; and that evidence of the state of the testatrix's assets was not admissible.—*Boys v. Williams*, Sim. 563.
9. (*Exoneration.*) In order to exempt the personal estate from the payment of debts, there must appear upon the whole will a manifest intention to that effect. (*Bootle v. Blundell*, 1 Mer. 193.)—*Driver v. Ferrand*, R. & M. 681.
10. (*Construction.*) A testator by his will directed the interest of a sum of stock to be paid to A. and B. and the survivor for life; then to C. for life; then the principal to C.'s children. By a codicil he gave to A. and B. and the survivor, an annuity for life, in lieu of the gift in the will: Held, that the gift to C. being expressly after the death of A. and B., an immediate gift to her could not be inferred from the substitution of another provision for A. and B., and that the gift to C. was not accelerated; and that the value of the gift was to be computed according to the price of the stocks at the death of the testator, when the life-interest first given to A. and B. was to commence. *David v. Rees*, R. & M. 167.
11. (*Remoteness.*) J. S. bequeathed his residuary estate to trustees, in trust to pay the income of one-third part to his daughter S. for life, and upon his death to stand possessed of that third in trust for her child or children, to be transferred to them at 25; but in case the daughter should leave but one child her surviving, then the whole of the one-third part to go to such only child at 25, and to be transmissible to her executors; and in case the daughter should leave no child her surviving, or in case no child should attain 25, then over: Held, that the gift to the children being contingent on their attaining 25, was void for remoteness.—*Judd v. Judd*, Sim. 525.
12. (*Condition.*) J. D. having two sons, one of whom, T. D., cohabited with a woman called A. R., threatened to disinherit him if he did not discontinue the connection; whereupon T. D. drew up and signed a declaration to the effect, that he was not married to A. R., and that he never more would have any communication with her. A. R. signed a declaration to the same effect. J. D. by his will gave his property upon trust to invest the same in the public funds, upon trust to permit T. D. to receive the interest of one moiety as long as he adhered to his engagement never to associate with A. R., which engagement he had put into the hands of his trustees and executors, so that it might be forthcoming when necessary—all benefit was to cease on his breaking this engagement, and the property to go as after directed as in case of T. D.'s dying unmarried and without issue. And upon further trust to pay to T. D. on the day of his marriage, such marriage to be with the consent of the trustees, the full amount of the moiety; and in case T. D. should marry without such consent, or should die without having been married with such consent and without having lawful issue, then his interest in the moiety was to go over to certain relations, and finally to cer-

tain charitable institutions. And he appointed the trustees to be the sole judges of the future conduct of T. D. After the testator's death, T. D. married A. R. under a feigned name, and thereby gained the consent of the trustees, who, thereupon, paid him the moiety of the fund. T. D. then filed a bill against the trustees and devisees over, stating that he had complied with the requisitions of his father's will, that he had not had any acquaintance with A. R., and praying that the trusts might be carried into execution. Shortly after the filing of the bill T. D. died, leaving A. R., with whom he had cohabited from the time of the marriage, surviving, and to her he bequeathed all his property; he left no issue. A. R. immediately filed an original bill against the trustees, containing the same statements and prayer as the bill of T. D. The trustees declared by their answer that they believed T. D. to have complied with the conditions of his father's will, and that otherwise they would not have consented to the marriage: Held, reversing the decree of the Court below; that the declaration of T. D. could not be received in evidence as part of the will of T. D., there being no proof that the engagement produced was the engagement referred to in the will; that the word "and" could not be read "or;" otherwise both events, T. D.'s dying unmarried, and without issue, must happen, in order to let in the remainder over: that T. D. did not marry with the consent of the trustees, and therefore the estates limited over vested in the devisees. (*Maberley v. Strode*, 3 Ves. 450; *Bell v. Phyn*, 7 Ves. 458.)—*Dillon*, app., *Harris*, res., Bligh, 321.

13. (*Implication of estates tail.*) A testator, in a very ungrammatical and obscure will, devised real and personal property so as to vest the whole legal interest in trustees, in trust for A. and B. during their lives, to their separate use; some unfinished and unconnected portions of sentences succeeded, and these were followed by a direction, that after the decease of A. and B., and failure of their male issue, the property should go to the grand daughters: A. and B. had each only one child, a daughter, and both these daughters were mentioned in the will: Held, that A. and B. were only tenants for life.—*Houston v. Hughes*, R. 116.
14. (*Construction.*) A testator gave to his wife "all his monies in hand," and to another "all his monies out on securities." The balance in the banker's hands passed under the first description. (*Carr v. Carr*, 1 Mer. 541.)—*Varsey v. Reynolds*, R. 12.
15. (*Construction.*) A gift of "all farming stock" will not as against a devisee pass crops on the ground, unless it is clear that the legatee is intended to take all the personal estate. (*Cox v. Godsall*, 6 East, 604; *West v. Moore*, 8 East, 339.)—*Varsey v. Reynolds*, R. 12.
16. (*Construction.*) A testator gives to his wife an annuity of £100, and the sum of £1000, which he considers will, with the property which she is entitled to after his death, make up to her an income of £2500 a year. In fact, those gifts make up her income only £1800 a year. She is entitled to have the deficiency supplied out of his residuary estate. (*Milner v. Milner*, 1 Ves. 106; *Whitfield v. Clements*, 1 Mer. 402.) *Trevor v. Trevor*, R. 24.

17. (*Construction.*) When a testator directs his real and personal estate to be sold, and his debts and legacies to be thereout paid, (including certain charitable legacies,) and gives the residue of the mixed fund to A. and B., the failure of the charitable legacies, as far as they would affect the real estate will enure to the benefit of A. and B. (*Durom v. Motteux*, Ves. 321.)—*Green v. Jackson*, R. 35.
18. (*Construction.*) A testator having appointed three trustees, and made moderate provisions for his three sons, directed all the furniture, &c. in his mansion house at B. to be sold, "except such parts thereof as his said trustees should think necessary to be kept for receiving any of them, or of the testator's sons, who should choose to go and spend a little time there occasionally;" and he bequeathed the bulk of his property upon trust to be accumulated, and at the end of the period of accumulation to be divided between the eldest male lineal descendants of his three sons respectively. In a subsequent clause a power of appointing new trustees was given. Under the direction of the Court, a liberal establishment had been maintained at B., at the expense of the estate: Held, that the privilege of residing at B. extended to new trustees: that a grandson of the testator had no such privilege.—*Thelluson v. Woodford*, R. 100.
19. (*Construction.*) A testatrix directs all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, and she then bequeaths the remainder of her rings, her necklaces of every description, pearls, garnets, cornelians, and watches to B.; by a subsequent testamentary disposition she gives all her trinkets of every denomination, her jewels excepted, to C.; and in another part of the same instrument, directs her jewels to be sold; afterwards, by a third testamentary instrument, she bequeaths to C. all her trinkets and pearls, with various specific articles, among which were some rings set with diamonds. The testatrix was possessed of a very valuable necklace and cross, and of a pearl necklace, besides other necklaces, and of various diamond rings, besides those which were specifically bequeathed: Held, that the diamond necklace and cross, and the diamond rings, not specifically mentioned, were to be sold, and did not pass to B.: that the pearl necklaces passed to B., under the gift of necklaces of every description, and did not pass to C. under the gift of pearls.—*Attorney General v. Harley*, R. 173.
20. (*Lunatic.*) A will was set aside, on the ground that the testator, though sane in his general conduct, laboured under a delusion with respect to his only daughter, whom he had excluded from the benefits of the will.—*Dew v. Clarke*, R. 163.

## WITNESS.

Where the wife claims with other persons, as next of kin, property under the administration of the Court, the husband is not a competent witness upon an issue to prove her consanguinity. (*Davis v. Dunwoody*, 4 T. R. 678.)—*Gregg v. Taylor*, R. 19.



**WRIT OF ERROR.**

After a writ of error *non pros'd* in the Exchequer Chamber, the plaintiff brought a writ of error returnable in parliament, which recited that the judgment of the Court below had been affirmed in the Exchequer Chamber. The latter writ was superseded with costs.—*In the matter of Plas-kets*, R. 155.

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## BANKRUPTCY.

[Deacon & Chitty, Part II.; 1 Montagu, Part IV.]

### ANNUITY.

The General Order of 1797 does not authorize an order by the commissioner for the sale of property on which an annuity is charged by way of rent-charge for payment of the value of the annuity. It should be an order made upon petition to the Court. (*Exp. Stack*, 1 G. & J. 346.)—*In the matter of Delves*, M. 492.

### ASSIGNEE.

1. (*Removal of.*) The Court has power to remove any assignee, official or otherwise, without being under the necessity of appointing another. The commissioner has a discretion to appoint or not appoint an official assignee, where the commission issued before the new Bankrupt Act came into operation.—*Exp. Ellis*, D. & C. 209.
2. (*Carrying on bankrupt's trade.*) Where the provisional assignee is directed to carry on the bankrupt's business for the benefit of the creditors, the official assignee will be directed to supply money for that purpose.—*Exp. Wyatt*, D. & C. 229.
3. (*Proof by.*) Assignees are not so strictly dealt with in regard to proving under a commission as persons acting in their own behalf.—*Exp. Smith*, D. & C. 267.
4. (*Reimbursement of.*) An assignee removed for the benefit of the estate, is entitled to be reimbursed out of any fund in hand. (*In re Roberts*, Buck, 465.)—*Exp. James*, D. & C. 272.
5. (*Removal of.*) An assignee accepting the office can only retire on paying the costs of his removal.—*Exp. Watts*, D. & C. 322.
6. (*Official.*) The official assignee is merely a ministerial officer, and cannot resist payment of a dividend.—*Exp. Alexander*, M. 503.
7. (*Appointment.*) The 1 & 2 W. 4, c. 56, s. 27, does not require the certificate of the appointment of assignees to be registered, in order to protect them against subsequent purchasers of the bankrupt's freehold property without notice, unless the property is situate in a register county.—*Exp. —*, D. & C. 349.
8. (*Insolvent.*) One of two assignees petitioned that his co-assignee, or the solicitor to the commission, (one of whom had the custody of the proceedings,) might inrol them, pursuant to 6 Geo. 4, c. 16, s. 96: Held, that before he petitioned for this purpose, he ought to have applied to the co-

assignee, or solicitor, to produce the proceedings at the office for enrolment.—*Exp. Evans*, D. & C. 353.

9. (*Election.*) From the 10th to the 23d March is a reasonable time for assignees to elect whether they will accept or reject the bankrupt's lease.—*Exp. Fletcher*, D. & C. 356.
10. (*Dividends.*) A surviving assignee is liable for the payment of dividends if his co-assignee ever admitted the proof of the debt, although the creditor has failed to apply for the dividends for many years; unless it can be proved that the creditor has received them, the onus of the proof of payment lying on the assignee; and this, notwithstanding there is no sufficient fund left of the bankrupt's estate to pay the creditor.—*Exp. Healey*, D. & C. 361.

## BANKRUPT.

(*Order and disposition of.*) A landlord distrained for rent arrear before the bankruptcy of his tenant, and when the goods were appraised, left them on the premises for the use of the bankrupt's wife. After the bankruptcy the landlord distrained again for the same rent: Held, that the goods were in the legal possession of the bankrupt, and within the intent and meaning of the 72d section of the Bankrupt Act; and that the second distress was therefore void.—*Exp. Shuttleworth*, D. & C. 223.

## CONTINGENT DEBT.

A bankrupt having on his marriage covenanted that his executors or administrators should, within twelve months after his decease, pay £4000 to trustees, upon trust to pay the interest to his wife for life, and after her death, the principal to the children of the marriage; and if no children, to the wife, if she survived her husband; but if not, then to his executors: Held, that this was a contingent debt, upon which a value might be set under the 6 Geo. 4, c. 16, s. 56, and that it might be proved by the trustees under the bankruptcy of the husband. (*Exp. Grundy*, 1 M. & M. 293.)—M. 463.

## CREDITOR.

1. (*Voluntary bond.*) *Semble*, that a creditor on a voluntary bond has a right to vote in the choice of assignees, he having every right except that of a dividend, which is payable only out of the surplus after the creditors for valuable consideration have been paid. (But see *Exp. Gladdis*, G. R. July 17th, 1832.)—*Exp. Venables*, M. 494.
2. (*Right to vote.*) A creditor who has proved is entitled to vote in the choice of assignees, if he apply before the commissioner has signed the declaration of appointment.
3. (*Forfeiture of debt.*) A. and B. arrested C. and D. for debt, and afterwards issued a commission of bankrupt against them; but after proving their debt, abandoned the commission, in order to proceed against the bail in the action. They then obtained the joint note of E. (one of the bail) and of C. and D., and compelled E. to pay the note; soon after which a second commission issued against D, as surviving

partner of C. After giving this note, the bail took an assignment from C. and D. of all their stock in trade, as an indemnity against the consequences of becoming bail: Held, that some of these circumstances operated as a forfeiture of the debt of A. and B. within the meaning of the 8th section of 6 Geo. 4, c. 16; also, that C. having died before adjudication under the first commission, that became null and void without any writ of supersedeas. — *Exp. Green*, D. & C. 230.

4. (*Jurisdiction.*) A creditor, resting upon a common law lien, without proving under the commission, previous to the Bankruptcy Court Act, appeared as a respondent, in opposition to a petition before the Vice-Chancellor, who ordered that the matter should be referred to the commissioners to ascertain the rights of the several parties, and that the creditor should have his costs. The creditor attended the inquiry before the commissioners, but did not draw up the order of the Vice-Chancellor: Held, that this was not enough to bring him within the jurisdiction of the Court: also, that filing an affidavit is not a waiver of any objection to the jurisdiction. — *Exp. Reid*, D. & C. 250.
5. (*Mortgagee.*) The clerk of a creditor, claiming as equitable mortgagee, drew up and signed the memorandum accompanying the deposit of a lease by the bankrupt, but it was not signed by the bankrupt himself, nor was it alleged that the clerk was authorized by the bankrupt to draw up such memorandum, or that it was ever shown to the bankrupt: Held, under these circumstances, that the equitable mortgagee was not entitled to the costs of the sale. — *S. C.*

#### EVIDENCE.

1. (*Cross-examination.*) A witness cannot be cross-examined for the purpose of contradicting him, except on points relevant to the issue. — *Exp. Palmer*, D. & C. 372.
2. (*Declarations.*) The declarations of a bankrupt, to be available for proving an act of bankruptcy, must be coupled with the act so as to form part of the *res gestæ*. — *S. C.*
3. (*Bankrupt's*) The Court will examine a bankrupt *vivâ voce* on his petition to supersede the commission. — *S. C.*

#### FIAT.

Where all the creditors lived in London except one, who had already proved their debts, and who consented to the application, the commission was impounded, and a fiat issued to a London commissioner. — *Exp. Johnson*, D. & C. 221.

#### MORTGAGEE.

1. Where an equitable mortgagee, who had exercised a power of sale and purchased the estate for £300, applied for the usual order, the estate was directed to be put up at that sum. — *Exp. Francis*, D. & C. 274.
2. On the application of an equitable mortgagee of leaseholds for leave to bid, the Court refused to order him to indemnify the assignees against any breach of covenants in the lease, but gave the assignees time to consider whether they would accept or reject the lease. — *Exp. Fletcher*, D. & C. 318.

## PARTNER.

1. (*Allowance.*) In cases of partnership each bankrupt is entitled to his allowance, provided there is a sufficient dividend on both estates, without regard to the estate from which the funds are supplied. (*Exp. Gibbs*, 1 Mont. 109.)—*Exp. Morris*, M. 505.
2. (*Solvent.*) A solvent partner has a right to retain the partnership books on the bankruptcy of the other.—*Exp. Finch*, D. & C. 274.

## PETITION.

If a petition is ordered to stand over on payment of the costs of the day, the objection to its being heard until they are paid cannot avail, unless the order has been drawn up.—*Exp. Clarke*, M. 503.

## POLICY OF INSURANCE.

A letter to the secretary of an insurance office, stating that the writer was the holder of a certain policy, is sufficient notice of an assignment of it; no notice is in fact necessary. (*James v. Gibbin*, 9 Ves. 407.)—*Exp. Stright*, M. 502.

## PRACTICE.

1. (*Examination.*) On a *viva voce* examination of a witness, if two assignees, not in adverse interests, appear by different counsel, only one counsel can examine the witness.—*Exp. Turnbull*, M. 506.
2. (*Surrender.*) Where the bankrupt was abroad when the commission issued, the time for his surrender will be enlarged.—*Exp. Dodds*, 506.
3. (*Delivery up of property.*) On the keeper of the records of the Privy Seal Office becoming bankrupt, certain papers in his hands were, upon the petition of his successor in office, ordered to be delivered up, although the assignees did not appear.—*Exp. Eden*, M. 506.
4. (*Superseding.*) A petition to supersede, and the usual certificate therewith, having been addressed to the Lord Chancellor, an order was made that the certificate might be amended, and received in its amended form, if the Lord Chancellor should think fit.—*In the matter of Ricard*, M. 507.
5. (*Certificate.*) Where a certificate signed by the two only creditors was dated by a third person, the Court allowed it to pass, there being no reason to doubt the honesty of the transaction, and the direction requiring the creditors to affix the date themselves not being statutory, but merely by an order. (*Exp. Laing*, 1 G. & J. 348.)—*In the matter of Jones*, M. 508.
6. (*Certificate.*) Where three mortgagees obtained an order from the Vice-Chancellor to stay the certificate until they could prove, and they were afterwards satisfied their debts, the certificate was allowed, notwithstanding the order of the Vice-Chancellor.—*In the matter of Hall*, M. 508.
7. (*Fiat.*) Where the petitioning creditor was aged, and unable to travel, his personal attendance at the opening of the fiat was dispensed with.—*In the matter of Wood*, M. 509.
8. (*Docket.*) Where the bond and affidavit were both on the same sheet

of paper, and the former set forth the bankrupt's description, but the affidavit merely mentioned his name, the Court ordered that the papers might be received at the office, if the Lord Chancellor should think fit. — *Exp. Greybourne*, M. 509.

9. (*Docket.*) In docket papers sent from the country, the word *commission* was used instead of *fiat*, and they were consequently refused at the office. In the meantime a London solicitor struck a docket, and applied for a fiat. Upon motion it was ordered, that, under the circumstances, the fiat should issue to the first applicant.—*Exp. Lechmere*, M. 510.
10. (*Amending fiat.*) The Court cannot amend a fiat, but will, in case of mistake, order it to be taken off the file, with liberty to amend if the Chancellor should think fit.—*In the matter of Walker*, M. 510.
11. (*Opening fiat.*) The time for opening a fiat will not be enlarged upon the application of the petitioning creditor; it may be on that of the bankrupt with the consent of the creditor.—*In the matter of North*, M. 511.
12. (*Opening fiat.*) Where the time for opening a fiat has expired by the contrivance of the bankrupt, leave was given to the petitioning creditor to strike a new docket; the petition was answered *instantly*.—*In the matter of Matthews*, M. 512.
13. (*Opening fiat.*) Upon a petition to enlarge the time for opening a joint fiat, on the application of the petitioning creditor, on account of the absence of a witness, the creditor being thereby prevented from proving an act of bankruptcy against one of the partners, the Court made the order, but intimated that such applications would not be encouraged.—*Exp. Moody*, M. 512.
14. (*Jurisdiction.*) Petitions addressed to the Lord Chancellor were, by a general order, directed to be transferred to the Court of Review.—*In the matter of Appling*, M. 512.
15. (*Appeal.*) An order, until drawn up, cannot be appealed against.—*Exp. Jenkins*, M. 513.
16. (*Production of papers.*) The Court of Review cannot order the Lord Chancellor's secretary of bankrupts to produce papers, but it will make an order giving him leave to do so.—*In the matter of Whitfield*, M. 513.
17. (*Order of Vice-Chancellor.*) The Vice-Chancellor had issued the usual order for the payment of costs on dismissing a petition. On an application to the Court of Review for a four day order, the Court held that it could not judicially notice the order of the Vice-Chancellor, the respondent not being in contempt in that Court, but granted the usual seven day order.—*Exp. Ferrers*, M. 513.
18. (*Equitable Mortgages.*) The Court will itself decide the question whether a mortgage be equitable or not, if practicable, instead of sending it to the commissioners.—*Exp. Smith*, M. 514.
19. (*Equitable Mortgage.*) If the assignees consent to an equitable mortgagee's bidding, costs may be paid out of the estate; if not, the petitioner must pay them.—*Exp. Williams*, M. 514.

20. (*Equitable mortgage.*) On an order for the sale of mortgaged premises, as the same solicitor was concerned for the assignees and the mortgagee, who was one of them, it was ordered that another solicitor should be appointed to conduct the sale.—*Exp. Rolfe*, M. 515
21. (*Superseding.*) A petition to supersede must state that the bankrupt was indebted at the time of presenting the petition. (Anon. 2 Mad. 281.) —*Exp. Flight*, M. 515.
22. (*Attestation.*) If the parties to a petition are numerous, the Court will order it to be heard, if signed by one of the parties only, and attested by his solicitor.—*Exp. Vines*, M. 516.
23. (*Signature.*) A petition by several may be answered on the signature of one of the petitioners, the solicitor undertaking to obtain the signature of the others before the hearing.—*Anon.* M. 517.
24. (*Service of petition.*) A party having been arrested for the costs of a petition to supersede a commission which was dismissed, but the petition was afterwards superseded upon a renewed application, an order to discharge him cannot be made without notice to an attorney to the petitioning creditor who claimed a lien upon the costs, even if the client consents. —*Exp. White*, M. 517.
25. (*Service of petition.*) An order to tax a solicitor's bill is not of course, but the petition must be served upon the solicitor.—*Exp. Griffith*, M. 517.
26. (*Answering petition.*) A petition not praying costs was allowed to be amended so as to include them: the costs caused by amending to be paid by the petitioner.—*Exp. Green*, M. 518.
27. (*Affidavits.*) Where a case stands over, the Court sometimes, for its own information, orders affidavits to be filed as to particular facts, or gives leave to do so. But, generally, fresh affidavits cannot be filed unless by order of the Court or consent of the other side.—*Exp. Fry*, M. 519.
28. (*Affidavits.*) On a petition to supersede on the ground of no act of bankruptcy, the petitioning creditor may make an affidavit in support of the commission.—*Exp. Lawley*, M. 519.
29. (*Affidavits.*) If the title of a petition is amended, affidavits previously filed in support must be re-sworn. *Exp. Meath*, M. 520.
30. (*Affidavits.*) Affidavits filed in support of a petition to the Lord Chancellor, which has been transferred to the Court of Review, cannot be read without notice. *Exp. Donaldson*, M. 520.
31. (*Proof.*) Where a creditor petitions to prove a debt not proveable, the petition will be dismissed with costs, notwithstanding the commissioners rejected the proof for an insufficient reason.—*Exp. Worthington*, D. & C. 288.
32. (*Examination of parties.*) An order to examine the parties to a petition, on the trial of an issue, was refused,—*In the matter of Christie*, 290.

33. (*Transfer of commission.*) A commission issued before the new act was transferred to one commissioner, and a fiat against the same bankrupt was directed to another: the Court ordered the commission to be transferred to the latter commissioner.—*In the matter of Knox*, D. & C. 317.
34. (*Amending fiat.*) The Court refused leave to amend a fiat which had been issued, on account of a slight misdescription of the bankrupt's residence, but directed a new fiat to issue.—*Exp. Todd*, D. & C. 319.
35. (*Bankrupt trustee.*) The Court will appoint a new trustee in the place of one becoming bankrupt. (*Exp. Inkersole*, 2 G. & J. 230.)—*Exp. Page*, D. & C. 321.
36. (*Costs of appearing.*) A party whose appearance is unnecessary, on being served with notice, is entitled to his costs: but if he makes affidavits which are unnecessary, he must pay the costs occasioned thereby.—*Exp. Reid*, D. & C. 322.
37. (*Sale of bankrupt's property.*) A bankrupt's property will not be directed to be sold by private contract without a previous reference to the commissioners.—*Exp. Goding*, D. & C. 323.
38. (*Service of petition.*) Where a renewed fiat is prayed by a creditor, by reason of the death of the commissioners, the assignees must be served with the petition.—*Exp. Ray*, D. & C. 341.
39. (*Examination of bankrupt.*) Where a bankrupt, after attending the last meeting before commissioners, inadvertently absented himself without passing his last examination: the Court, on the payment of costs, ordered a fresh meeting for that purpose.—*Exp. Dixon*, D. & C. 350.
40. (*Answering.*) It is a matter of course to *enlarge* the time for which a petition is answered.—*Exp. Beardsworth*, D. & C. 369.
41. (*Allegation.*) If in the title of a petition by creditors to supersede, they are so styled, there need be no express allegation to that effect.—*Exp. Springett*, D. & C. 380.
42. (*Petition.*) A petition for keeping separate accounts, which might be done under the general order, was dismissed with costs.—*Exp. Green*, D. & C. 382.

#### PROMISSORY NOTE.

A note payable "to R. or order, on demand," is not a note payable to "the bearer on demand," and is consequently within the second class of notes within the first schedule of the Stamp Act, which are chargeable with the lower duty.—*Exp. Robinson*, D. & C. 276.

#### PROOF.

1. (*Dormant partner.*) Traders in partnership having admitted a dormant partner, his share in the joint stock is in the order and disposition of the ostensible partners, and distributable as such; but the creditors of the new firm and those of the old, who had notice of the admission of the dormant partner, may prove *pari passu* with the other creditors of the old firm. (*De Mantort v. Saunders*, 1 B. & A. 398; *Exp. Hamper*, 17 Ves. 563.)—*Exp. Chuck*, M. 457.



2. (*Expunging.*) The Court will not expunge a proof merely because the creditor has instituted process in a foreign country for the recovery of his debt.—*Exp. Colesworth, D. & C.* 281.
3. (*Probable objection.*) The Court will make no order for proof of a debt, in anticipation of a probable objection that may be made to such proof by the commissioner. When any application of this nature is made previous to the choice of assignees, the petitioning creditor should be served with the petition.—*Exp. Beaumont, D. & C.* 360.
4. (*Trustee.*) Where a bankrupt trustee had misapplied the trust fund, the Court directed that the son of the *cestui que trust* might prove the amount, retaining the dividends until further order.—*Exp. Vine, D. & C.* 357.

#### SETTLEMENT.

1. (*Limitation until bankruptcy.*) A limitation in a marriage settlement to the husband until bankruptcy, and upon that event for the benefit of the wife and children, is valid to the extent of the wife's property. (*Lockyer v. Savage, 2 Strange, 947; Brandon v. Robinson, 18 Ves. 429.*) *Lester v. Garland, M.* 471.
2. (*Construction.*) A deed executed may be construed according to the evident intent of the parties, as collected from the recitals and provisions of the deed.—*Higginson v. Kelly, 1 Ball & B.* 255.

#### STATUTE OF LIMITATIONS.

The statute of limitations does not attach on a debt proved under a commission of bankruptcy.—*Exp. Healey, D. & C.* 361.

#### STAYING CERTIFICATE.

1. (*Delay.*) Where a creditor does not use due diligence to prove his debt, he is not entitled to petition to stay the bankrupt's certificate, in order to afford him time to do so, with a view of dissenting from its allowance.—*Exp. Bostock, D. & C.* 383.
2. (*Affidavit.*) An affidavit by the bankrupt in answer to such a petition, filed two days before the hearing, may be read; but if it make any charge of delay against the petitioner which he is anxious to explain, the Court will give him time for that purpose, more especially if the amount of his debt would turn the certificate.—*S. C.*
3. (*Service of petition.*) A petition to stay the certificate, and expunge a creditor's name from it who had signed it, on the ground that he had been previously satisfied his debt, must be served upon the creditor.
4. (*Election.*) A creditor, by petitioning to stay the certificate, makes his election to come in under the commission for every probable debt which may be owing to him from the bankrupt; and, therefore, the bankrupt must be discharged from any action pending against him by the creditor in respect of any such debt, before the petition can be proceeded in.—*S. C.*
5. (*Assignee.*) The assignees cannot be heard, on a petition by an individual creditor to stay the bankrupt's certificate, although they may have been served with the petition.—*S. C.*

SUPERSEDING FIAT.

1. (*Surrender.*) The Court will not hear the petition of a bankrupt to supersede a fiat, until the bankrupt has surrendered, notwithstanding the petition is presented before the 42d day, and comes on before the time for surrendering has expired. (*Exp. Perker*, 2 G. & J. 337.)—*Exp. Drake*, M. 486.
2. (*Petition.*) The 17th section of the 1 & 2 W. 4. c. 56. does not prevent a bankrupt from applying to supersede, though two months have elapsed from the date of the fiat.—*Exp. Palmer*, M. 497.
3. (*Petition.*) A single creditor coming to supersede on the ground of fraud or collusion, must pray that a new fiat may issue. Or he may pray for the removal of the assignees, and the appointment of others. *Exp. Shum*, D. & C. 261.

WITNESS.

- (*Examination.*) A commissioner under 6 G. 4. c. 16. s. 33 & 34. has a right to examine a witness only as to the matters relating to the person, the trade, the dealings, or the estate of the bankrupt. A question, therefore, addressed to the executrix of a debtor of the bankrupt (who had pleaded *plene administravit* to an action by the assignees for the recovery of the debt), as to the amount, &c. of assets left by the testator, was properly refused.—*Exp. Solarti*, M. 495.

## ECCLESIASTICAL.

3 Haggard, Part 4.

### ADMINISTRATION.

1. The intestate was sole assignee of an intestate's estate. At the time of his death, there was due an outstanding debt of 130*l*. The debtor wished to pay, but there being no one authorised to give a discharge, by arrangement between the debtor's solicitor and the solicitor under the commission, it was paid into a bank to their joint credit. The Court refused to grant a limited administration of this sum to the new assignee. The next of kin had not been cited. *In the Goods of Hilton*, 793.
2. This was a suit for inventory &c. and to make distribution, by a party in distribution against an administrator. An application being made that an administration bond should be pronounced forfeited, on the ground of a *devastavit* by the administrator in appropriating the property to his own use, and that the bond might be delivered out of the registry in order to be put in suit against the sureties, the Court referred to the registrar to report what remained to be distributed, and to allot portions, and, on such report, assigned the administrator to pay to each person entitled under the statute of distributions his respective share, and, the administrator alleging that he had become bankrupt and obtained his certificate, directed the bond to be attended with, but declined to pronounce it forfeited.—*Young v. Skelton*, 780.
3. (*Feme Covert*.) The rule, unless special cause be shown, will be, in future, to grant administration *de bonis non* of the wife to the husband's representatives.—*Fielder v. Fielder*, 769.
4. The Court refused to grant administration to the nominee of an official board at the Cape of Good Hope, under whom the next of kin had placed the affairs of the intestate, but granted it to a creditor after citing the next of kin.—*The goods of John Reitz*, 766.

### ALIMONY.

In a case of separation for cruelty and adultery on the part of the husband, it being proved that his real estate was 6000*l*. a year, subject to the mother's jointure of 1000*l*. a year, and the wife's pin-money of 500*l*. a year, the Court allotted 1000*l*. a year permanent alimony; the husband being authorised to deduct any payment on account of pin-money exceeding 200*l*. a year, which sum he had agreed to allow the wife for the maintenance of the children.—*Mylton v. Mylton*, 657.

### APPEAL.

In an appeal from a Consistorial Court, promoted by a churchwarden, on the ground of a refusal by the judge to grant a monition against the churchwardens of a division of the parish to show cause why they should not join

in making a general rate, such churchwardens may be made respondents though not parties to the suit below; and the refusal of such monition authorises a citation of them out of the diocese.—*Cotterell v. Mace and another*, 743.

**BANKRUPT.** See ADMINISTRATOR.

**CITATION.** See APPEAL.

**EVIDENCE.**

(*Of Foreign Law.*) The Court granted administration on the French consul-general's certificate of the law of France, but expressed a doubt whether the ambassador ought not to have certified. Dr. Lushington stated that the authority of the consul-general has generally been deemed sufficient in similar applications.—*In the Goods of Anne Dormoy*, 767.

**FEME COVERT.** See ADMINISTRATOR.

**EXECUTOR.**

1. After inserting an advertisement, calling on creditors to come in and pay A. & B., executors in trust, they were held compellable to take probate, and condemned personally in the costs of the opposition.—*Long v. Symes*, 776.
2. A married woman having separate property, over which she had and exercised a disposing power, may continue the chain of executorship. (2 East, 554; 15 Ves. 156; 4 Bro. C. C. 533.)—*Birkett v. Vandercrom*, 750.

**PECULIAR.**

Where the testator left goods in two royal peculiars, and other goods in one diocese of the province: Held, that probate was rightly granted in the peculiar where he died, and that there was no necessity for a prerogative probate.—*Smith v. Smith*, 757.

**PEW.**

Cause of perturbation of church seat. It appeared that the pew, erected under a faculty in 1725, was transferred to A. in 1816 under an assignment of the remainder of a term which expired in 1826; that C. continued to sit in the pew till his death; that in 1831 the house was sold by auction, and that the auctioneer B. was authorised to occupy the pew temporarily by the churchwardens, he having by the contract of sale engaged to deliver possession of it with the house. B. occupied for a short time under this authority: Held, that he had no possession in which to support the present suit, he having no right to sell the pew nor the churchwardens to confirm the sale.—*Blake v. Usborne*, 727.

**PRACTICE.**

1. (*Costs out of estate.*) The testatrix had executed three wills, but destroyed them all. After the making of the first she had become insane, but as she was sane when the first was made, a decree was obtained, with intimation to show why probate of the instructions for the first will should not be granted. The decree was issued, but witnesses were examined on interrogatories on the behalf of the parties in distribution with a view to prove

insanity prior to the instructions. The parties in distribution having failed in this object, the Court refused to decree costs out of the estate.—*In the goods of E. Brand*, 754.

2. (*Costs*.) Probate was called in by a niece of the half-blood, and the executor was put to the proof of the codicil. An allegation, charging incapacity, was put in by the niece. The Court, in giving judgment for the admission of a responsive allegation, advised the niece to abandon her opposition rather than go on at the risk of costs. The niece having persevered, but eventually yielded, the Court condemned her in costs.—*Waters v. Howlett*, 790.
3. (*Additional articles*.) On an appeal, on the ground of the rejection of additional articles to a libel in a matrimonial suit, the Court delivered a judgment against the appeal, from which it is to be collected that, to justify the admission of new facts, it should appear that they were discovered subsequently to the admission of the libel, and were not merely important but nearly decisive and conclusive.—*Story v. Story*, 738.

#### PROBATE.

(*Survivorship*.) The testator by will directed that his wife, if living at his decease, should have all his property, and be sole executrix, and in the event of her dying in his lifetime, then the will appointed three executors and trustees. The testator and his wife both perished at sea, leaving no issue. The respective times of their deaths were unknown. The Court granted probate in the common form, the next of kin of the wife making no opposition, and having it in their power to call in the probate and contest the point.—*In the Goods of H. Selwyn*, 748.

REVOCATION.—See WILL.

#### SIMONY.

This was a criminal suit brought by the churchwardens against the incumbent for simony. There was no evidence of his having been privy to any simoniacal contract, and the Court holding, that even if he had been presented in consequence of a simoniacal contract made for his benefit without his knowledge, he could not be criminally punishable, dismissed the suit with costs.—*Whish and another v. Hesse, Clerk*, 659.

#### TITHES.

To set out the tithes of potatoes by the tenth basket, as raised, and immediately remove the nine parts, is not sufficient. (1 B. & Adol. 812).—*Thompson v. Bearblock*, 795.

#### WILL.

1. An allegation that a will made at Batavia was local from its very nature, and that it was customary to make such wills to bar certain local claims, was not admitted to nullify the effect of the will, which was regularly executed.—*Philipp v. Thornton*, 752.
2. (*Revocation*.) An allegation that a former will was read over to several persons, and declared to them to be the last will of the testator, and that the former will was found carefully locked up, and the latter will found lying amongst loose papers, was held inadmissible against a latter will regularly executed.—*Daniel v. Nockolds*, 777.

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## ABSTRACT OF PUBLIC GENERAL STATUTES.

(2 & 3 WILLIAM IV.—*continued.*)

CAP. 59.—An Act to transfer the Management of certain Annuities on Lives from the receipt of His Majesty's Exchequer to the management of the commissioners for the reduction of the national debt; and to amend an Act for enabling the said commissioners to grant life annuities and annuities for terms of years. [4th July, 1832.]

CAP. 60.—An Act for holding the Assizes for the King's County in Ireland twice in every year at Tullamore, instead of Philipstown. [4th July, 1832.]

CAP. 61.—An Act to render more effectual an Act passed in the Fifty-ninth Year of His late Majesty King George the Third, intituled, An Act to amend and render more effectual an Act passed in the last Session of Parliament, for building and promoting the building of additional Churches in populous parishes. [11th July, 1832.]

CAP. 62.—An Act for abolishing the punishment of death in certain cases, and substituting a lesser punishment in lieu thereof. [11th July, 1832.]

S. 1. Repeals so much of the 7 & 8 Geo. 4, c. 29, and of 9 Geo. 4, c. 55 (*Ireland*), as makes stealing in a dwelling-house to the value of five pounds or more, and stealing, or killing with intent to steal, horses or other cattle, capital felonies, and enacts that persons convicted of any of the above offences, or of counselling, aiding, or abetting the commission thereof, shall be transported for life.

S. 2. Limits the time for granting pardons and remission of labour to persons sentenced to transportation by the governors of colonies.

CAP. 63.—An Act to enable Peers of Scotland to take and subscribe in Ireland the oaths required for qualifying them to vote in any election of the Peers of Scotland. [11th July, 1832.]

CAP. 64.—An Act to settle and describe the divisions of counties, and the limits of Cities and Boroughs, in England and Wales, in so far as respects the election of Members to serve in Parliament. [11th July, 1832.]

CAP. 65.—An Act to amend the Representation of the People in Scotland. [17th July, 1832.]

CAP. 66.—An Act to provide for the conveyance of premises, the property of the Crown, situate between the Tower of London and London Bridge. [17th July, 1832.]

CAP. 67.—An Act to amend an Act of the Seventh and Eighth Years of the Reign of His late Majesty King George the Fourth, relating to the union of Parishes in Ireland. [17th July, 1832.]

CAP. 68.—An Act for the more effectual Prevention of Trespasses upon property by persons in pursuit of game in that part of Great Britain called Scotland. [17th July, 1832.]

CAP. 69.—An Act to prevent the Application of Corporate Property to the purposes of Election of Members to serve in Parliament. [1st Aug. 1832.]

S. 1. No monies or personal property belonging to municipal corporations, shall be applied in or towards the expenses of parliamentary elections: and all bonds, covenants, recognizances, or judgments, given, executed, or suffered by or on behalf of any such corporation, for the purpose of securing the payment of such expenses, shall be void.

S. 2. Gifts, payments, bonds, &c. given by any corporation or other person in their behalf, for the purpose of inducing any person to exert himself in elections at a future time, shall be deemed void by this act, though colourably given for any other consideration.

S. 3. All conveyances of real property belonging to any municipal corporation made for the purpose of satisfying or securing any expenses hereby prohibited shall be void.

S. 4. All votes or resolution passed by any corporation for the purpose of authorizing any payment, matter, or thing forbidden by this act, shall be void.

S. 5. Corporate officers or others making payments contrary to this act shall be liable to make good the amount so misapplied.

S. 6. Any two or more corporators may commence actions in the name of the corporation against any person who has made such illegal payment; provided that the plaintiffs before plea shall give security for costs.

S. 7. Members of corporations directing any such payment, or concurring in any affirmative vote or proceeding relating thereto, shall be deemed guilty of a misdemeanour, and on conviction, in addition to such punishment as the Court may award, shall be for ever disabled to hold any office in the same corporation.

CAP. 70.—An Act to continue for one year, and from thence to the end of the then next Session of Parliament, several Acts relating to the importation and keeping of Arms and Gunpowder in Ireland. [1st August, 1832.]

CAP. 71.—An Act for shortening the Time of Prescription in certain cases.

[1st August, 1832.]

S. 1. No claim, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken or enjoyed from or upon any land, except such matters as are herein specially provided for, and except tithes, rent, and services, shall be defeated by showing the commencement of the right at any time prior to thirty years' enjoyment: and after sixty years' enjoyment the right shall be deemed absolute, unless had by consent or agreement by deed or writing.

S. 2. No claim to any way or other easement, or to any watercourse, or the use of any water, shall be defeated by showing the commencement of the right or user at any time prior to twenty years' enjoyment; and after forty years the right shall be deemed absolute, unless had by consent or agreement by deed or writing.

S. 3. Claim to the use of light enjoyed for twenty years without interruption shall be deemed absolute, notwithstanding any local usage or custom, unless enjoyed by consent or agreement by deed or writing.

S. 4. The before-mentioned periods shall be deemed to be those next before some suit wherein the claim shall be brought in question, and no



act shall be deemed an interruption, unless submitted to for one year after notice thereof.

S. 5. In actions on the case, and other pleadings, the claimant may allege his right generally, as at present, and give this Act in evidence; in pleading to actions of trespass, and all other pleadings, where the party used to allege his claim from time immemorial, it shall be sufficient to allege the enjoyment as of right by the occupier of the tenement for the periods mentioned in this Act, without claiming under the owner of the fee, and any incapacity, agreement, or other matter, not inconsistent with the enjoyment, shall be specially alleged in answer to the party claiming.

S. 6. No presumption shall be made in favour of any claim, or proof of an enjoyment for a less period than those respectively above-mentioned.

S. 7. The time during which any person capable of resisting any such claims shall be an infant, idiot, *non compos mentis*, feme covert, or tenant for life, or during which any suit shall have been pending, shall be excluded from the above computation of the periods, except where the right is hereby declared absolute.

S. 8. When a use of way or water shall have been enjoyed under a term for life or years, exceeding three years from the granting thereof, the time of enjoyment during the continuance of the term shall be excluded in the computation of forty years, in case the claim shall be resisted within three years after the determination of the term by any person entitled to a reversion expectant on such determination.

S. 9. This Act not to extend to Scotland or Ireland.

S. 10. To commence on the first day of Michaelmas term, 1832.

CAP. 72.—An Act to extend the provisions of an Act of the Seventh and Eighth years of the Reign of His late Majesty King George the Fourth, relative to remedies against the Hundred. [1st August, 1832.]

S. 1. If any threshing machine, whether fixed or moveable, shall be feloniously damaged or destroyed by any persons riotously and tumultuously assembled together, the inhabitants of the hundred, or other district, in which the offence shall be committed, shall be liable to yield full compensation, not only for the damage done to the machine, but also for any damage done at the same time to any erection or fixture about or belonging to such machine.

S. 2. The provisions of 7 & 8 Geo. 4, c. 31, shall extend to threshing machines.

S. 3. This act not to extend to Scotland or Ireland.

CAP. 73.—An Act to amend two Acts of the Seventh Year of the reign of his late Majesty King George the Fourth, and in the first and second years of the reign of his present Majesty, for the uniform valuation of Lands and Tenements in the several Baronies, Parishes, and other divisions of Counties in Ireland. [1st August, 1832.]

CAP. 74.—An Act to permit the Distillation of Spirits from Mangel Wurzel. [1st August, 1832.]

CAP. 75.—An Act for Regulating Schools of Anatomy. [1st August, 1832.]

S. 1. The Secretary of State for the Home Department in Great Britain, and the Chief Secretary in Ireland, may grant licenses to practise anatomy to any fellow or member of any college of physicians or surgeons, or to any graduate or licentiate in medicine, or any person qualified to practise medicine, or to any professor or teacher of anatomy, medicine or surgery, or to any student attending any school of anatomy, on application from the party, countersigned by two justices of the peace for the county or place wherein such party resides, certifying that to their knowledge or belief the party applying is about to carry on the practice of anatomy.

S. 2. The Secretary of State may appoint not fewer than three persons to be inspectors of schools of anatomy, and from time to time appoint other inspectors in their room or in addition to them.

S. 3. And may direct what district every inspector shall superintend, and in what manner such inspector shall transact the duties of his office.

S. 4. Every inspector shall make a quarterly return of subjects removed for anatomical examination.

S. 5. Every inspector may inspect places within his district, where anatomy is practised.

S. 6. His Majesty may grant salaries to inspectors.

S. 7. Persons having lawful possession of bodies, not being undertakers or entrusted with the bodies for interment, may permit them to undergo anatomical examination, unless the deceased shall have expressed his desire either in writing or verbally, in presence of two witnesses during his last illness, that his body might not undergo examination, or unless any known relative of the deceased shall require the body to be interred without examination.

S. 8. If any person shall direct that his body after death be examined anatomically, and such direction shall before burial be made known to the party having lawful possession of the body, such party shall permit such examination to be made, unless the nearest known relative of the deceased shall require the body to be interred without examination.

S. 9. No body shall be removed from the place of death until after forty-eight hours after death nor until after twenty-four hours' notice to the inspector of the district of the intended removal; or if no inspector be appointed, to some physician, surgeon or apothecary, residing near the place of death; nor unless a certificate stating the cause of death shall have been signed by the physician or surgeon who attended the deceased, or by some physician or surgeon called in after death, and who shall state the manner and cause of death according to the best of his knowledge and belief, but who shall not be concerned in examining the body after removal; such certificate to be given to the party receiving the body for anatomical examination.

S. 10. Persons having licenses may receive bodies for anatomical examination, or may examine anatomically, if permitted by the party having lawful possession of the bodies, and provided a certificate as aforesaid were delivered with the body.

S. 11. Every party receiving a body for examination shall demand a certificate, and within twenty-four hours after removal transmit the same to the inspector, and a return of the day and hour and from whom the body was received, the date and place of death, the sex and (if known) the name, age, and last place of abode of the deceased, and shall keep a copy of the certificate in a book, to be produced when required by any inspector.

S. 12. It shall not be lawful for any party to carry on or teach anatomy at any place, or to receive for examination or examine any body after removal, unless one week's notice shall have been given, to the secretary of state, of the place where it is intended to practise anatomy.

S. 13. Every body removed for examination shall, before removal, be placed in a decent coffin or shell, and the party removing shall make provision that the body, after examination, be decently interred; a certificate of such interment to be transmitted to the inspector within six weeks after the body was received.

S. 14. No licensed person shall be liable to any prosecution or punishment for having in his possession for examination, or for examining any dead human body, according to the provisions of this Act.

S. 15. Nothing in this Act shall prohibit any post mortem examination required to be made by any competent legal authority.

S. 16. So much of the 9 Geo. 4, c. 31, as directs that the bodies of murderers may be dissected is repealed; and on conviction for murder the Court may direct the body of the party convicted to be hung in chains, or buried in the precincts of the prison, in which the prisoner shall have been confined after conviction.

S. 17. Actions brought against any person for any thing done in pursuance of this act shall be commenced within six calendar months after cause of action accrued; and the defendant may either plead the matter specially, or the general issue not guilty, and give this act and the special matter in evidence.

S. 18. Persons offending against the provisions of this act in England or Ireland, shall be deemed guilty of a misdemeanour, and on conviction be liable to imprisonment for not more than three months, or to a fine not exceeding 50*l.*; persons in like manner offending in Scotland shall be liable to the same punishments.

S. 19. The words "person and party" in this act shall respectively be deemed to include any number of persons, or any society, whether by charter or otherwise.

S. 20. This act to commence from the 1st of August, 1832.

**CAP. 76.**—An Act to defray the Pay, Clothing, and contingent and other expenses of the Disembodied Militia in Great Britain and Ireland; and to grant allowances in certain cases to Subaltern Officers, Adjutants, Paymasters, Quarter-masters, Surgeons, Assistant-surgeons, Surgeons-mates, Serjeant-majors of the Militia, until the first day of July, one thousand eight hundred and thirty-three.

[1st August, 1832.]

CAP. 77.—An Act for the better regulation of the Linen and Hempen Manufactures of Ireland. [1st August, 1832.]

CAP. 78.—An Act to continue certain Acts relating to the Island of Newfoundland, and to provide for the appropriation of all duties which may hereafter be raised within the said Island. [1st August, 1832.]

CAP. 79.—An Act to continue until the thiriy-first day of December, one thousand eight hundred and thirty-four, an Act of the fifth year of his late Majesty, relating to the Fisheries in Newfoundland.

[1st August, 1832.]

CAP. 80. An Act to authorize the identifying of Lands and other Possessions of certain Ecclesiastical and Collegiate Corporations.

[3d August, 1832.]

S. 1. Archbishops, bishops, deans and chapters, and other ecclesiastical and collegiate corporations, may enter into agreements or deeds of reference with their lessees or tenants, or with the owners of lands adjoining their manors, lands, tithes or hereditaments, whereby it shall be agreed that any disputed boundaries or quantities of such manors, lands, &c. or any part thereof, shall be referred to the adjudication of such person or persons as may be agreed upon by the parties in dispute; and such referees shall be fully authorized to make surveys, maps and admeasurements, to summon and examine witnesses on oath; and also to call for the production of all surveys, maps, deeds, books and papers in the custody or power of the parties to the references, or of any other person, concerning the matters in question; and that the said referees shall make their award in writing under hand and seal, with maps thereto annexed, and which award and maps shall be on parchment or vellum, and shall determine, identify and delineate the boundaries, quantities, particulars and situations of such manors, lands, &c. so referred; and such award and maps shall be laid before all the parties to the reference, including the parties whose consent is required by this act (s. 2), whose approbation shall be written on the award, and signed and sealed by them, and thereupon the award and maps shall be binding on all parties and final as to all matters therein contained.

S. 2. In case the above powers shall be exercised by any bishop, dean, archdeacon, prebendary, or other ecclesiastical corporation sole, the deed or agreement of reference, and the approbation of the award, shall, in case of a bishop, be executed by the archbishop of the province testifying his consent; in case of a dean, by the dean and chapter; or in case of an archdeacon, prebendary, or other ecclesiastical corporation sole, by the archbishop or bishop of the diocese,

S. 3. The lessee, copyhold or customary tenant, sub-lessee and other owner, his or their heirs, executors, administrators, or assigns, who at the time of the reference shall be tenant in fee tail, general or special, or for life or lives, and the guardians, husbands, committees or attorneys of such lessee, &c. who at the time of the reference shall be an infant, feme covert, of unsound mind, or beyond the seas, or under other legal disability, may execute any agreement or deed of reference or approbation of

any award or map, as effectually as the party could have done if not under any of the disabilities before mentioned.

S. 4. After approbation the agreement or deed of references, award and maps, and a copy of the minutes of evidence shall be deposited respectively in the office of the registrar of the archbishop or bishop, or dean and chapter; and in case of reference by a college, in the office of the steward or other proper officer of the college or hall; and such registrar or officer shall, on application, produce the documents so deposited at all usual hours of business, to every person interested in the award, or his agent, and shall furnish copies if required; and such registrar or officer shall be entitled to a fee of 5*s.* for receiving such documents, and to 1*s.* for inspection, and to 6*d.* a folio for every copy, and 10*s.* for a copy of a map.

S. 5. The expenses of reference shall be borne in the proportions agreed upon between the parties, or, if no agreement, in equal moieties.

S. 6. This act to extend only to England and Wales.

CAP. 81. An Act to enable His Majesty to carry into effect a Convention made between His said Majesty and the Emperor of all the Russias.

[3d August, 1832.]

CAP. 82. An Act to reduce the Duties now payable in certain cases on Carriages with less than Four Wheels.

[3d August, 1832.]

CAP. 83. An Act to authorize for one year the removal of Prisoners from the several Gaols in Ireland in cases of Epidemic Diseases.

[3d August, 1832.]

CAP. 84. An Act to amend the Laws relating to the Customs.

[3d August, 1832.]

S. 3. A certificate shall not be required of the due landing of goods, for drawback or bounty, exported from the United Kingdom to Guernsey, Jersey, Alderney, or Sark.

S. 4. Masters of vessels coming from Africa to report how many natives of Africa they have taken on board in Africa.

S. 5. Masters or owners of vessels coming from Africa to give bond in £100 to maintain or send back such Africans as they bring from thence.

S. 6. Certificates of entry of goods inwards for the computation of the drawback or for delivery, no longer required, except so far as respects goods entered to be shipped for exportation for drawback at any other port than that of importation.

S. 7. Restriction in 6 Geo. 4, c. 107, s. 21, as to valuation of piece goods, repealed.

S. 8. Value of such goods to be ascertained in same manner as all other goods entered at value.

S. 9. Commissioners of the Treasury may appoint additional ports for warehousing tobacco and snuff.

S. 10. Foreign goods derelict, jetsam, flotsam, and wreck, to be deemed the produce of such country as the commissioners of customs shall determine; if such goods will not sell for the amount of duty, to pay an ad valorem duty.

S. 11. Allowance for damage may be made for such goods.

S. 12. Goods landed by bill of right fraudulently cancelled, shall be forfeited.

S. 13. Clause of 6 Geo. 4, c. 107, restricting importation of wine to ships of 60 tons, repealed.

S. 14. The king by commission out of the Court of Exchequer, may appoint ports and legal quays for lading and unlading goods, and annul same.

S. 15. In any information or other proceeding for any offence against the laws relating to the customs, the averment that such offence was committed within the limits of any port, shall be sufficient without proof of the limits, unless the contrary be proved.

S. 16. Persons not authorized by the proprietor or consignee of goods, making entry inwards thereof, to forfeit £100.

S. 18. Persons procuring others to assemble for the purpose of assisting in unshipping prohibited or uncustomed goods, to forfeit £100.

S. 19. Persons aiding or concerned in landing tea or foreign manufactured silk of £20 value, liable to forfeiture, to forfeit treble the value, and be liable to detention.

S. 20. Vessels and boats used in piloting or fishing to be painted black.

S. 21. Officers of customs or excise may, on probable cause, stop carts, &c. and search for goods; drivers refusing to stop and submit to examination, to forfeit £100,

S. 22. Officers authorized by writ of assistance, and having a peace officer, may search houses for prohibited and uncustomed goods, and break open doors and packages to seize such goods.

S. 25. Persons resisting officers, or rescuing or destroying goods to prevent seizure, to forfeit £100.

S. 26. Persons offering bribes to officers to forfeit £200.

S. 27. Vessels, boats, and goods seized under any law relating to the customs, and ordered to be prosecuted, shall be deemed to be condemned, unless the owner gives notice within one month that he intends to claim.

S. 28. Persons convicted before two justices in any penalty relating to the customs, trade or navigation, and not paying the penalty, may be committed until the penalty shall be paid.

S. 29. Persons employed for the prevention of smuggling to be deemed duly employed, and proof of the contrary to lie on the defendant.

S. 30. Restricted goods may be described in the information, for the purpose of proceeding for forfeiture, as goods liable to and unshipped without payment of duty.

S. 31. If persons in gaol do not appear or plead to the information within twenty days, judgment shall be entered by default; and execution may be awarded not only against the body, but against his real and personal estates.

S. 32. Married women convicted before two justices of any offence against the customs may be committed to prison.

S. 33. In ports where there is no comptroller, the collector of customs, with the governor, lieutenant-governor, or commander-in-chief, may make registers of British vessels and grant certificates thereof.

S. 34. Declarations substituted for oaths, where required by the registry act by the 1 & 2 W. 4, c. 4.

S. 35. Contains a new table of duties inwards.

S. 36 to 40 relate to duties.

S. 41 to 48. Regulations as to goods warehoused.

S. 58. Where proceedings have been instituted in any court abroad against any vessel or goods for the recovery of any penalty or forfeiture, the execution of a decree restoring such vessel or goods shall not be suspended by appeal, provided the party appellate give security to render the same in case the decree be reversed.

S. 59. Persons using forged documents abroad for unloading, lading, entering, reporting or clearing any vessel, or for landing or shipping goods, shall forfeit £200.

CAP. 85.—An Act to make a better provision for the superintendence of Charitable Institutions in Ireland, maintained in the whole or in part by Grand Jury presentments; and for the more effectual audit of the accounts of the same. [3d August, 1832.]

CAP. 86.—An Act to amend an Act of the Forty-fifth year of His Majesty King George the Third relating to Post Roads in Ireland.

[3d August, 1832.]

CAP. 87.—An Act to regulate the Office for Registering Deeds, Conveyances, and Wills, in Ireland. [4th August, 1832.]

CAP. 88.—An Act to amend the Representation of the People of Ireland.

[7th August, 1832.]

CAP. 89.—An Act to settle and describe the Limits of Cities, Towns, and Boroughs in Ireland, in so far as respects the Election of Members to serve in Parliament. [7th August, 1832.]

CAP. 90.—An Act to authorise the Commissioners of His Majesty's Treasury to grant compensation to the Inspectors and Coal-meters of the City of Dublin, and to impose a rate upon Coals imported into the Port of Dublin, to provide a Fund for such compensation. [7th August, 1832.]

CAP. 91.—An Act to explain doubts that have arisen respecting the Stamp Duty payable by Freemen of Corporations entitled by virtue of trade and residence in the Corporate Towns and Counties of Cities and Towns in Ireland. [7th August, 1832.]

CAP. 92.—An Act for transferring the Powers of the High Court of Delegates both in Ecclesiastical and Maritime causes to His Majesty in Council. [7th August, 1832.]

S. 1. Repeals so much of 25 H. 8, c. 19, as relates to any power thereby given to appeal to the King in his High Court of Chancery, and so far as the same empowers the King to grant a commission for the appointment of delegates, from February 1, 1833.

S. 2. Repeals 8 Eliz. c. 5, from same date.

S. 3. From February 1, 1833, the power heretofore exercised by the High Court of Delegates shall be transferred to the King in Council, and

their decree shall be final, and no commission of review thereafter granted.

S. 4. This act not to affect any appeals now pending, or which may be pending before February 1, 1833, nor to affect the right of His Majesty to grant a commission of review upon any appeal now pending, or that may be pending before the above date.

CAP. 93.—An Act for enforcing the process upon Contempts in the Courts Ecclesiastical of England and Ireland. [7th August, 1832.]

S. 1. In all causes cognizable in any of the ecclesiastical courts in England or Ireland, where any persons, as well as those having privilege of peerage, or members of the House of Commons, as others, are residing in England or Ireland, beyond the limits of the jurisdiction of the court in which the cause is depending, having been cited to appear in such court, or required to comply with any lawful order or decree, whether final or interlocutory, shall refuse obedience, or commit a contempt towards the court or its process, the judge thereof may pronounce them contumacious, and within ten days signify the same to the Lord Chancellor in the form annexed to the 58 Geo. 3, c. 127, and thereupon, if the person in contempt be not a peer or member of Parliament, a writ *de contumace capiendo* shall issue, directed to the persons to whom writs *de excommunicato capiendo* were by law returnable (a), and shall be returnable as such writs. And the regulations and provisions of the said act and of the 5 Eliz. c. 23, applying to the writ *de excommunicato capiendo*, and the proceedings thereupon, shall be applied to the writ *de contumace*; and upon the appearance or submission of the party, the judge of the ecclesiastical court may order him to be absolved or discharged.

S. 2. Where persons, as well peers and members of parliament as others, shall neglect to pay money ordered by such courts, or to perform any order or decree of such courts, the judge may pronounce such persons contumacious, and certify the same to the Lord Chancellor, who shall order an exemplification of the decree or order to be enrolled, and shall cause process of sequestration to issue against the real and personal estate of the parties against whom the order or decree shall have been made.

S. 3. The like provision as to persons residing and possessed of estates in Ireland.

S. 4. This act not to extend to orders or decrees made six years before the passing of this act.

S. 5. Actions or suits brought for any thing done in pursuance of this act to be commenced within three calendar months after the fact committed, and to be laid and tried in the county wherein the cause of action shall have arisen: the defendant may plead the general issue, and give this act and the special matter in evidence: in case of verdict or judgment for defendant, he shall have treble costs.

CAP. 94.—An Act for raising the sum of Thirteen Millions Eight Hundred and Ninety-six Thousand Six Hundred Pounds by Exchequer Bills, for the service of the Year One Thousand Eight Hundred and Thirty-two.

[9th August, 1832.]

(a) This seems a mistake in the Act; and should be "directed."



CAP. 95.—An Act for granting to His Majesty, until the Fifth Day of April, One Thousand Eight Hundred and Thirty-three, certain Duties on Sugar imported into the United Kingdom, for the service of the Year One Thousand Eight Hundred and Thirty-two. [9th August, 1832.]

CAP. 96. An Act for the better Employment of Labourers in Agricultural Parishes, until the Twenty-fifth Day of March, One Thousand Eight Hundred and Thirty-four. [9th August, 1832.]

S. 1. Whenever at a meeting of a parish vestry, convened according to the 58 Geo. 3, c. 69, three-fourths of the rate-payers shall come to an agreement solely for the purpose of employing and relieving the poor of such parish, such agreement shall be reduced into writing, and submitted to the justices at the next Petty Sessions; and if approved of by them, such agreement shall be binding on the rate-payers for any period not exceeding six calendar months, as shall be specified therein.

S. 2. Any party may appeal to the next Quarter Sessions for the county; and the justices at such Sessions may make such alterations in the agreement, and make such order therein, and award such costs, as they shall think just; such appeal to be final and not removeable by *certiorari* or otherwise into any of the courts at Westminster.

S. 3. Notwithstanding notice of appeal, the agreement shall be acted upon until the appeal is determined, and the justices may award damages to be paid out of the poor-rates to the party aggrieved.

S. 4. This act not to sanction the making up the deficiency in wages out of the poor-rates.

S. 5. Rates not to be applied in the employment of any person out of the parish.

S. 6. This act not to extend to any city or town containing more than one parish, nor to places where the poor-rate shall not exceed 5s. in the pound.

S. 7. This act to extend to all parishes having separate overseers, and all vestry meetings which may by law be holden by the inhabitants of such parish.

S. 8. Nothing herein contained to affect the provisions of the 22 Geo. 3, c. 83.

S. 9. Commencement of act October 1, 1832.

CAP. 97.—An Act to repeal several Acts for enabling the wives and families of soldiers, and the widows and families of deceased soldiers, to return to their homes. [9th August, 1832.]

CAP. 98.—An Act for Regulating the Protesting for Nonpayment of Bills of Exchange drawn payable at a place not being the place of the residence of the Drawee or Drawees of the same. [9th August, 1832.]

All bills of exchange wherein the drawer or drawers shall have expressed that such bills are to be payable in any place other than the place therein-mentioned to be the residence of the drawee, and which shall not on presentment for acceptance be accepted, shall or may be without further presentment protested for nonpayment in the place wherein they are expressed to be payable, unless the amount shall have been paid to the

holder on the day on which such bills would have been payable if duly accepted.

CAP. 99.—An Act for transferring the Powers and Duties of the Commissioners of Public Accounts in Ireland to the Commissioners for Auditing the Public Accounts of Great Britain. [9th August, 1832.]

CAP. 100.—An Act for shortening the Time required in Claims of Modus decimandi, or exemption from or discharge of Tithes.

[9th August, 1832.]

S. 1. All prescriptions and claims of or for any modus or exemption from tithes by composition real or otherwise, shall be deemed valid on showing the payment of the modus or the exemption from tithes for thirty years, unless the payment or render of tithes, or other matter in lieu thereof, shall be proved to have taken place at some time prior to such thirty years, or it shall be proved that such modus or exemption was in pursuance of some consent or agreement by deed or in writing; and if such proof in support of the claim shall be extended to sixty years before the demand, in such case the claim shall be deemed indefeasible, unless it shall be proved that such payment of modus was made by some consent or agreement, expressly made for that purpose by deed or writing; and when the demand shall be made by any corporation sole, whether spiritual or temporal, then the prescription or claim to be indefeasible, upon evidence showing such payment for and during two incumbencies, and for not less than three years after the commencement of a third. Provided that if such incumbencies be for less than sixty years, that then the proof shall extend to such time over the incumbencies as will make up sixty years, and to such three years as aforesaid, unless the payment, &c. be evidenced by deed or writing as aforesaid.

S. 2. Every composition confirmed by a decree in a Court of Equity, to which the ordinary patron and incumbent were parties, is declared valid; and no modus or exemption is to be within the act if not acted upon within one year before the passing of the act.

S. 3. The act not available in any suit commenced at, or to be commenced within one year after, the passing of the act.

S. 4. Act not to extend to cases where tithes demised for life or years by deed, or where composition made by deed or writing for any such term, and such demise or composition shall be subsisting at the passing of the act, and an action or suit shall be instituted within three years after the expiration of the demise or composition.

S. 5 & 6. Time during which lands shall be held by persons entitled, by composition or otherwise, to the tithes thereof, to be excluded from the computation, and also the time during which a person otherwise capable of resisting shall be an infant, *non compos*, *feme covert*, or lay tenant for life, or during the pendency of any suit prosecuted diligently until abated by death.

S. 7. Made sufficient in actions or suits after this act to plead that the modus or exemption was actually exercised and enjoyed for such of the periods as may be applicable; and if the other party shall rely on any

proviso, &c. or matter of fact or law, not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same must be pleaded specially.

S. 8. No presumption allowed in respect of any assignment for a less period than those named.

S. 9. Act to extend to England only.

CAP. 101.—An Act to authorize his Majesty to appoint a Person to act as Sheriff of Selkirkshire during the Incapacity of the present Sheriff.

[9th August, 1832.]

CAP. 102.—An Act to repeal the Excise Duties on Flint Glass, and to impose other duties in lieu thereof; and to amend the Laws relating to Glass.

[10th August, 1832.]

CAP. 103.—An Act to provide for the Examination and Audit of the Customs and Excise Revenues in Scotland.

[11th August, 1832.]

CAP. 104.—An Act to regulate the Period of Rendering the Public Accounts and making up the General Imprest Certificates.

[11th August, 1832.]

CAP. 105.—An Act for the better Support of the Dignity of the Speaker of the House of Commons; and for disabling the Speaker of the House of Commons for the time being from holding any Office or Place of Profit during pleasure under the Crown.

[11th August, 1832.]

CAP. 106.—An Act to enable the Officers in His Majesty's army, and their representatives, and the widows of officers, and persons on the compassionate list, and also civil officers on retired or superannuation allowances, payable by the paymaster general of His Majesty's forces, to draw for and receive their half pay and allowances.

[11th August, 1832.]

CAP. 107.—An Act for regulating for three years, and from thence until the end of the then next sessions of parliament, the care and treatment of insane persons in England.

[11th August, 1832.]

S. 1. Repeals 9 G. 4, c. 4, and 10 Geo. 4, c. 18, but existing appointments to continue till others made.

S. 2. Defines certain words used in the act.

S. 3. The Lord Chancellor, Keeper of the Great Seal, or other person entrusted by the King's sign manual with the care of lunatics, to appoint not less than fifteen nor more than twenty commissioners within London and Middlesex and certain places mentioned in the act, to be called "Metropolitan Commissioners in Lunacy," of whom not less than four nor more than five to be physicians, and two, barristers; such commissioners to grant licenses to keep lunatic houses; each physician to be paid £1. per hour whilst employed.

S. 4. In case of death or removal others to be appointed.

S. 5. Imposes the oath.

S. 6 and 7. Treasurer or clerk to be appointed and take an oath.

S. 8 and 9. Meetings for the granting of licenses to be held on the first Wednesday in November, February, May, and July, in each year, or five commissioners to hold an extraordinary meeting.

10 and 11. In all other parts of England, justices at sessions to grant

licenses and appoint visitors, namely, three or more justices of the peace, and one or more physician, surgeon or apothecary.

S. 12. No person to be eligible as commissioner or visitor, nor to act as justice in granting license, &c., who shall have been interested within two years in any lunatic house, &c. No visiting medical men to attend patients in the house without special order.

S. 13 and 14. Clerk of the peace, or some other person appointed at sessions, to be clerk to the visitors, and to be paid out of the county rate such remuneration as the justices shall fix. Such clerk to be allowed an assistant if necessary.

S. 15. Fourteen days' notice of application for license, and a plan of the house to be licensed, to be given to the clerk.

S. 16. Detached buildings to be considered part of the house.

S. 17. Upon alteration of house, plan to be amended and notice given.

S. 18. and 19. Licenses to be made out by the clerk, at the rate (besides the stamp) of 10s. a piece for each insane person confined, not being a parish pauper, and 2s. 6d. for each parish pauper; but not more than 15l. to be paid for each license. Fees may be reduced in certain cases. Licenses to be on 10s. stamp, and sealed.

S. 20 and 21. The proceeds of licenses to be applied towards the expenses of the act. Account to be kept by the clerk and transmitted to the treasury.

S. 22, 23, 24, 25 and 26. Declare that no person shall be received into such a house without a license, and regulate the granting and revoking of licenses. Notice of refusal to be sent to the Home Secretary.

S. 27. Insane persons, &c. not to be received into a licensed house without an order and a certificate from two medical practitioners, according to forms given by the act.

S. 28. Requires that persons signing the certificate shall have visited the patient, and makes falsely certifying a misdemeanour. Persons interested in the house, or whose father, son, brother, or partner is wholly or in part proprietor or professional attendant, are disqualified from certifying.

S. 29. Regulates the admission of pauper lunatics.

S. 30. and 31. Notice of the admission, death, or removal of each patient to be given to the clerk of the visitors within two days.

S. 32. Statement of pauper patients dying to be transmitted to the clerk.

S. 33. Licensed houses containing one hundred patients to have a resident medical man, and every such house (not kept by a medical man) containing a less number, to be visited twice a week.

S. 34. Commissioners, &c. may alter the periodical visits of medical attendants.

S. 35 and 36. Houses to be inspected four times a year by the commissioners, and three times a year by the visitors appointed at sessions, at the least; but the clerk is not to accompany them, unless required for some special purpose by them.

S. 37. Commissioners to inquire whether Divine Service performed, or why omitted.

S. 38 and 39. Plan to be hung up in each licensed house, and commissioners and visitors to make minutes of their visits, to be transcribed into a book.

S. 40. Concealing persons from inspection, made a misdemeanour.

S. 41. Commissioners, &c. may set patients at liberty, except found lunatic &c. under a commission, when they are only authorised to report.

S. 42. Upon receiving information of malpractices on oath, commissioners may visit at night.

S. 43. The clerk to furnish information as to any person confined, on order from the commissioners, &c.

S. 44. Annual report to be made to the Lord Chancellor, &c.

S. 45. Transcripts of all memorials to be sent to the metropolitan clerk.

S. 46. No person to be received into an unlicensed house without order &c. under pain of the person receiving being deemed guilty of a misdemeanour.

S. 47. Copies of such order &c. to be transmitted to the metropolitan clerk.

S. 48. The Chancellor or Home Secretary may order the visitation of persons under domestic restraint, but not of patients under a committee.

S. 49. The Chancellor or Home Secretary may order commissioners, &c. to visit public hospitals, asylums, &c.

S. 50 and 51. Orders, &c. relative to persons dying or cured, and registers of private patients, to be delivered to the Lord Chancellor.

S. 52. Commissioners, &c. may summon witnesses and examine on oath.

S. 53. Persons offending against the act may be summarily convicted before two justices.

S. 54. Form of conviction.

S. 55. In all indictments, &c. proprietors and superintendents to justify themselves according to the ordinary course of law, as if the act had not been made.

S. 56. Provides for the recovery (before two justices), and the application, of penalties.

S. 57. Gives an appeal to Quarter Sessions.

S. 58. Limits actions to within six months, gives the general issue, and treble costs against the plaintiff, if he fails.

S. 59. Actions, &c. not to be brought or prosecuted under the act, except by order of commissioners or justices.

S. 60. Clerk to enforce act and recover penalties.

S. 61. Prosecution to be by indictment at the Assizes, except in metropolitan districts.

S. 62. Act not to extend to Bethlehem Hospital, nor to the county asylums under 48 Geo. 3, c. 96, 9 Geo. 4, c. 40.

S. 63. Not to extend to public hospitals or institutions, except as to visitations and transmission of names of patients.

S. 64. Act to commence from the passing, to be in force for three years, and to be deemed a public act.

(Schedules with forms are annexed.)

CAP. 108.—An Act for amending the Laws in Ireland relative to the Appointment of Special Constables, and for the better Preservation of the Peace. [15th August, 1832.]

CAP. 109.—An Act for Settling and Securing Annuities on the Right Honourable Charles Mannors Sutton, and on his next Heir Male, in consideration of the eminent services of the said Right Honourable Charles Mannors Sutton. [15th August, 1832.]

CAP. 110.—An Act for the better Regulation of the Duties to be performed by the Officers on the Plea or Common Law side of the Court of Exchequer. [15th August, 1832.]

S. 1. Reciting that the business is greatly increased, enacts, that there shall be five principal officers on the plea side, (exclusive of the Clerk of the Pleas,) and regulates the duties to be performed by each.

S. 2. The offices are to be held during good behaviour, and the officers to have such assistants as the barons may approve.

S. 3. Officers and assistants not to act as attorneys or agents.

S. 4. After present holder, office of Clerk of Errors to be filled by the senior master or prothonotary.

S. 5. Attendance to be as directed by the Court.

S. 6. Leave of absence may be granted or deputy allowed.

S. 7. Vacancies in certain cases to be filled by the Chief Baron.

S. 8. Office of Clerk of the Pleas not to be again filled up.

S. 9. Regulates the filling up of vacancies in the offices of master and prothonotary.

S. 10. Salaries of said five officers to be fixed by the Court, and paid from fees to be accounted for yearly.

S. 11. Present clerk of the pleas to receive an annual sum provisionally.

S. 12. No officer named in pursuance of the act to be compensated if office abolished.

S. 13. Act to commence from the passing.

S. 14. Act may be altered during the Session.

CAP. 111.—An Act to abolish certain Sinecure Offices connected with the Court of Chancery, and to make Provision for the Lord High Chancellor on his Retirement from Office. [15th August, 1832.]

S. 1. Abolishes the offices of Keeper or Clerk of his Majesty's Hanaper, the Patentee of the Subpoena Office, the Registrar of Affidavits, the Clerk of the Crown in Chancery, the Clerk of the Patents, the Clerk of the Custodies of Lunatics and Idiots, the Prothonotary of the Court of Chancery, the Chaff Wax, the Sealer, the Clerk of the Presentations, the Clerk of Inrolments in Bankruptcy, the Clerk of Dispensations and Faculties, and the Patentee for the execution of the Laws and Statutes concerning Bankrupts, from August 20th, 1833.

S. 2. Nothing in the act to determine any of the said offices now holden in possession or reversion by any person appointed prior to the 1st of June last, until the death or resignation of such person.

S. 3. Retiring salary of 5000*l.* annexed to the office of Chancellor.

CAP. 112.—An Act to authorise the Hereditary Land Revenues of the Crown in Scotland being placed under the management of the Commissioners of the Land Revenues. [5th August, 1832.]

CAP. 113.—An Act to continue, until the Fifth Day of April, One Thousand Eight Hundred and Thirty-four, Compositions of Assessed Taxes, and to grant relief in certain cases. [15th August, 1832.]

CAP. 114.—An Act to amend the Laws relating to Bankrupts.

[15th August, 1832.]

S. 1. After reciting 6 Geo. 4, c. 16, and 1 & 2 Geo. 4, c. 56, provides for the custody of records of commissions of bankrupt, &c. theretofore entered of record.

S. 2. Commissions, &c. enrolled before September 1, 1825, to be deemed effectually enrolled and entered of record.

S. 3. Certificate of such entry of record to have the same effect as if commission issued before September, 1825.

S. 4. Any judge of the court of bankruptcy empowered to order any commission, &c. to be enrolled, and officer authorised to enter on record the matters directed by these acts to be recorded on application of the parties.

S. 5. Fiats to be entered of record on the application of any party interested.

S. 6. Regulates the fees of entering on record.

S. 7. In case of the death of witness in support of the commission, deposition to be read in evidence, but in such cases only where the party using the same shall maintain some right &c. which the bankrupt might have claimed in case no commission had issued against him.

S. 8. No fiat to be received in evidence unless first entered of record.

S. 9. Proceedings in bankruptcy, purporting to be sealed with the seal of the court, to be received in evidence.

S. 10. Lord Chancellor empowered to direct the appropriation of certain monies appertaining to the secretary of bankrupts' account.

CAP. 115.—An Act for the better securing the Charitable Donations and Bequests of His Majesty's subjects in Great Britain professing the Roman Catholic Religion. [15th August, 1832.]

This statute, reciting that it is expedient to remove all doubts as to the right of Roman Catholics to hold property necessary for religious worship, education, and charitable purposes, enacts that Roman Catholics shall be in these respects on the same footing as Protestant dissenters.

CAP. 116.—An Act to provide for the Salaries of certain High and Judicial Officers, and of Payments heretofore made out of the Civil List revenues. [16th August, 1832.]

CAP. 117.—An Act to Amend the Law relating to the Appointment of Justices of the Peace and of Juries in the East Indies.

[16th August, 1832.]

**CAP. 118.**—An Act to Restrain for Five Years, in certain Cases, Party Processions in Ireland. [16th August, 1832.]

**CAP. 119.**—An Act to Amend three Acts passed respectively in the Fourth, Fifth, and in the Seventh and Eighth Years of the Reign of His late Majesty King George the Fourth, providing for the Establishing of Compositions for Tithes in Ireland, and to make such Compositions permanent. [16th August, 1832.]

**CAP. 120.**—An Act to Repeal the Duties under the Management of the Commissioners of Stamps on Stage Carriages and on Horses let for Hire in Great Britain, and to grant other Duties in lieu thereof; and also to Consolidate and Amend the Laws relating thereto. [16th August, 1832.]

**CAP. 121.**—An Act to enable His Majesty to carry into effect a Convention made between His Majesty and the King of the French and Emperor of all the Russias and the King of Bavaria. [16th August, 1832.]

**CAP. 122.**—An Act for making Provision for the Lord High Chancellor of England in lieu of Fees heretofore received by him.

[16th August, 1832.]

**S. 1.** Authorizes £150,000 to be carried to the fund for the benefit of the suitors of the Court of Chancery.

**S. 2.** Power given to change securities.

**S. 3.** Money to be called in, if required, to answer demands of suitors.

**S. 4.** Repeals so much of the 53 Geo. 3, c. 24, as relates to payments to be made by the Bank and the Chancellor to the Vice-Chancellor.

**S. 5.** £10,000 a year to be in future paid out of the Suitors' Fund to the Chancellor.

**S. 6.** Officers to account for fees, and pay them into the Bank to the account of the Accountant-General.

**S. 7.** regulates the investment of money so paid.

**S. 8 & 9.** Annuities to be henceforth payable half-yearly to certain officers of chancery in lieu of fees.

**S. 10.** Receipts of Accountant-General to be sufficient discharge.

**S. 11.** Perquisites received by Chancellor from the Clerk of the Hanaper to cease.

**S. 12.** Certain portion of salary received by the Chancellor to be repaid.

**S. 13.** Charges formerly payable in respect of the chancellorship to cease.

**S. 14.** Payment of costs and proceedings under the act.

**S. 15.** Powers given to the Lord Chancellor by the act, to extend to his successors.

**CAP. 123.**—An Act for Abolishing the Punishment of Death in certain cases of Forgery. [16th August, 1832.]

**S. 1.** Reciting 1 W. 4, c. 66, enacts, That where any person shall after the passing of this act be convicted of any offence whatsoever, for which the said act enjoins or authorizes the infliction of the punishment of death, or where any person shall after the passing of this act be convicted in Scotland or Ireland of any offence now punished with death, which



offence shall consist wholly or in part of forging or altering any writing, instrument, matter, or thing whatsoever, or of offering, uttering, or disposing of any writing, instrument, matter, or thing whatsoever, knowing the same to be forged or altered, or of falsely personating another, then and in each of the cases aforesaid the person so convicted of any such offence as aforesaid, or of procuring, or aiding, or assisting in the commission thereof, shall not suffer death, or have sentence of death awarded against him, but shall be transported beyond the seas for the term of such offender's life.

S. 2. The act not to extend to persons convicted of forging or altering, or of offering, uttering, or disposing of, knowing the same to be forged or altered, any will, testament, codicil, or testamentary writing, with intent to defraud any body corporate or person whatever, or of forging or altering, or of uttering, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or South Sea House, or at the Bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud, &c.

S. 3. It shall not be necessary to set out any copy or fac-simile of the forged instrument in the indictment.

CAP. 124.—An Act to Explain certain Provisions in Local Acts of Parliament relating to Double Toll on Turnpike Roads. [16th August, 1832.]

CAP. 125.—An Act for enabling His Majesty to Direct the Issue of Exchequer Bills to a limited Amount for the Purposes and in the Manner therein mentioned; and for giving relief to Trinidad, British Guiana, and St. Lucie. [16th August, 1832.]

CAP. 126.—An Act to apply a Sum out of the Consolidated Fund and the Surplus of Ways and Means to the Service of the Year One Thousand Eight Hundred and Thirty-Two; and to appropriate the supplies granted in this Session of Parliament. [16th August, 1832.]

CAP. 127.—An Act for appointing additional Commissioners to put in Execution the Acts for granting an aid to His Majesty by a Land Tax, and continuing the Duties on Personal Estates, Offices, and Pensions.

[16th August, 1832.]

## EVENTS OF THE QUARTER.

CHANCERY Reform is once again, as it often again must be, the leading topic in this department. After a good deal of changing and wavering, Lord Brougham has at length favoured the world with something like a definite plan. Almost all of it has already appeared, in detached portions, in former numbers of this work, and we are far from certain that it may be regarded as fixed ; but we will briefly sum up, from his last explanatory oration and his bill, what were his lordships' intentions in August last.

It is proposed to abolish the Report Office, and remodel the Registrars' and Masters' Offices. The consequent savings are computed at 31,000*l.* a year, namely, in the Report Office, 4,000*l.* ; in the Registrars' Office, 14,000*l.* ; in the Masters' Office, 13,000*l.* Copy money and gratuities in the Masters' Office are to be done away. The Six Clerks' Office and Subpoena Office are not included in the bill. Those departments, with one or two other branches of the system, it is said will be more conveniently introduced with one or two other measures, which will be rendered necessary by the Act 2 & 3 W. 4, c. 111.<sup>1</sup> A new Court of Appeal is to be formed of the Chancellor, the Vice-Chancellor, the Master of the Rolls, and the Chief Baron. The judge whose decision is appealed against will be excluded from the hearing. The suitor will have the option of appealing to this court or to the House of Lords ; but the new court is not to be appealed from except in the case of a diversity of opinion amongst the judges. The House of Peers is to be invested with a power (there is some doubt as to it now) of calling equity judges, as they now call common law judges, in aid. The political functions of the Chancellor, that is to say, his presidency of the House of Lords and his place in the cabinet, are to be disjoined from his judicial functions ; and the judicial moiety of the Chancellorship is to be held on the same tenure as the rest of the Bench. Lord Brougham is of opinion that the salary of the present biform Chancellorship will be quite sufficient for the two parts into which it is to be cut, but he says nothing as to the proportions he has in view. In effecting these changes, he thinks certain changes in the salaries of the judges will be necessary ; and he avails himself of the opportunity to inveigh against the present inferiority of the salary received by the Master of the Rolls to that of the Chief Justice of the Common Pleas. He ends by an explanation of the suitors' fund, which he contends has never been misappropriated by parliament, because parliament has never touched the principal and only now and then laid violent hands on the accumulations of interest.<sup>2</sup>

This project is hardly yet ripe for debate, and when it becomes so, we must approach it in form. For the present, we have only a scattered hint or two to throw out. First, we see no reason for giving the suitor the selection of his court of appeal ; the option can serve no other purpose than to enable him to avail himself of any interest he may happen to possess with the peers. Secondly, the proposed division of the Chancellorship ought not to have been formally announced, until Lord Brougham was prepared to explain the measures with which he intended

<sup>1</sup> Ante, p. 525.

<sup>2</sup> This Bill differs in many essential particulars from Mr. Spence's, and is evidently in opposition to his views.

to accompany the alteration ; for instance, whether he means the political Chancellor to belong, as now, to the profession of the law, or thinks that a legal functionary in the cabinet is unnecessary. We rather think all this must end in having a minister of justice as in France. Thirdly, if the salary of the Master of the Rolls be too low, raise it by all means ; but why should it be regulated with reference to that of the Chief Justice of the Common Pleas, who has greater expenses and more work ? As to their relative rank, we never heard that precedence depended upon pay, or pay upon precedence.

The question as to the suitors' fund is a merely speculative one, as it is not very likely that rightful claimants, sufficient to exhaust it, will rise up, but Lord Brougham's notions on the subject are the very opposite of sound. Chancery boasts of being the nursing mother of the estates committed to her care,—if she now and then devours her nurslings, she is not the only mother recorded in natural history who does that—and considering her only as an ordinary trustee, she is bound, at any rate, to manage the property as a moderately prudent person would manage his own. To say, therefore, that the suitor is only entitled to his principal, and that the interest belongs to the public or the court, is in direct opposition to the principles which Lord Brougham is hourly called on to enforce. There is another false notion upon this subject, of which, if we do not mistake, he has also condescended to avail himself before now. On proposing to create or raise salaries, it has been said, the public have nothing to do with the matter, for the salaries in question will be paid out of the suitors' fund. Now the suitors' fund is to all intents and purposes a public fund, if it is to be regarded as disposable at all ; and parliament should look as narrowly at payments made out of it, as at any other payments that can be named.

In the same speech (August 15th) Lord Brougham fairly and openly avowed that the main branch of his new bankruptcy jurisdiction, the Court of Review, had not succeeded to his wish ; that it was underworked, and must have some additional employment, as a part of the insolvent business, transferred to it. He stated that all the other parts of the system had worked well ; and on full inquiry amongst traders of all descriptions, we have great pleasure in confirming the account. The official assignees, in particular, of whom we once entertained considerable doubts, have given pretty general satisfaction. The inexorable Sir Edward Sugden notwithstanding declared towards the end of the last session, that he was anxious to move the repeal of nine-tenths of the new Bankrupt Act.

Lord Brougham has secured himself a bridge of gold to retreat upon, in case, which is not unlikely, any thing should go wrong with the ministry. An act raising the retiring pension of the Chancellor has passed. We regard this as one of the most injudicious measures Lord Brougham was ever guilty of, considering his bitter diatribes at Lord Eldon's money-getting propensities ; and awfully may it tell against him on some future question of confidence or character :—

“ *Turno tempus erit, magno cum optaverit emptum  
Intactum Pallanta, et cum spolia ista diemque  
Oderit.* ”

The only redeeming feature in this sorry affair is its openness.

Many of the bills mentioned in former numbers as pending, will be found in our Abstract of Statutes. The bills founded on the Real Property Reports stand over. It is understood that they will pass eventually ; and so most probably will the Registration Bill. But too much doubt and discontent still exists concerning it, for the measure to be risked for a year or two, and the Report of the House of Com-

mons is not by any means decisive enough to put a stop to the controversy. The saving clause in favour of small transactions, indeed, rather adds to, than diminishes, the prevailing uncertainty. As the subject excites great interest, and the Appendix is not generally accessible, we have given a more than ordinarily full abstract of the evidence.

On the first of August last, a petition of great importance was presented to the House of Commons by Mr. Freshfield: a petition from the Incorporated Law Society, pointing out the inconveniences of the judges' chambers, and calling for a remedy. We have more than once invited attention to this subject, and it has also found a place in the *Common Law Reports*.<sup>1</sup> Several influential members addressed the House in support of the petition, and bore testimony to the high character and anticipated usefulness of the society from which it came. Mr. Hume, after stating that in his last visit to the judges' chambers he was near losing the tails of his coat, said: "I really think that when hundreds of thousands are thrown away in improving the wilds of America, the government might devote a few thousands, to this most useful purpose. I am convinced that the present inconvenient buildings operate in an extraordinary degree to impede the administration of justice." The Attorney-General, Mr. Hudson Gurney, Mr. Whittle Harvey, and Mr. Hant, followed to the same effect; the latter adding, that Mr. Hume might esteem himself fortunate if he escaped with the loss of his tail, considering what an army of attorneys and clerks are generally in waiting at the doors. The Chancellor of the Exchequer, we are sorry to say, refused to pledge himself to forward the object of the petition, which he evaded under cover of a sarcasm at Mr. Hume's newly acquired passion for architecture. The society, doubtless, will not suffer the matter to drop.

Returns of all the judges' salaries have recently been made and published. It is to be hoped that these will convince the public that no further reduction can be hazarded. From November 1828, the salary of a puisne judge has been fixed at 5,000*l.* a year, from which a deduction, varying between 600*l.* and 900*l.*, for circuit expenses, is to be made. Considering the average incomes made by leaders of the bar, and the ordinary rate of living in this country, we hold that the bench cannot be competently filled for less.

Local Courts are understood to form the more immediate subject of inquiry with the Common Law Commissioners. A Report on Wills and Testamentary Matters by the Real Property Commissioners is in readiness, but it cannot be printed until the next meeting of parliament. A number of new orders, made under the power given by the fifteenth section of the Uniformity of Process Act, will be promulgated very shortly. They ought to have been promulgated long ago, as the act will come into operation immediately, and will be found extremely difficult of application by itself.

There is yet another commission which promises to be no less interesting to the legal practitioner than to the statesman or economist—the Poor Law Commission, which, though formed of unpaid members, is by no means less active than the rest. Their first proceeding was to send forth printed queries, directed to the persons most actively engaged in the administration of the poor laws; one set of queries being framed expressly for the rural districts, and another distinct set for the towns. As answers to these queries came in, commissioners itinerant were deputed from the Central Board to examine witnesses on the spot, to inspect books and visit workhouses. During the last three months, the greater part of the country,

<sup>1</sup> 6 L. M. 296, 298.

including almost all the parishes distinguished by peculiar management, has been visited by these commissioners, who are still in progress. We learn that they are expected to complete their circuits and make their reports in the course of a few weeks. The state and progress of pauperism in some of the parishes, and the corruption of the local authorities, have, it is reported, been found in many instances to exceed all prevalent notions on the subject. In some parishes, the inhabitants, in utter despair of any efficient or honest local administration, ardently pray that the government will take into its hands the administration of their affairs; a prayer which, in the present state of things, is not likely to be complied with. The landowners and larger householders of the overburthened town-parishes, where the poor chiefly reside, are crying out, and apparently with much justice, for a consolidation of the parishes, and for a national or at least a county rate, the object being to reduce their expenditure by making the more wealthy parishes contribute according to their means. In one parish, occupied by the labouring classes of a town, the rates are 15s. or 20s. in the pound; in the next adjacent parish, which is inhabited by wealthy tradesmen and gentry, the rates are no more than from 3s. to 6s. in the pound. The poorer parishes say to the wealthier parishes: "we lodge and sustain the casualties of the labourers who serve you, and you, as receiving the benefit of their services, ought to contribute, not only at an equal but even at a higher rate, for maintaining those labourers, when from sickness or inability to obtain work they are obliged to seek parochial relief." In London, the vestry clerks and most active intelligent parochial officers, call loudly for the repeal of the jurisdiction at present exercised by police magistrates over parochial cases, and the establishment of a central office, to which all business of the sort may be transferred. Until the labours of the commissioners are closed, no determinable propositions can be expected of the Board; but we are informed that such is the demand from all quarters for an alteration of the law of settlement, and especially for the abolition of settlements by hiring and service, by apprenticeship, by renting or purchasing a tenement, and by serving a parish office, that these several descriptions of settlement may be considered as gone, and with them, at one fell swoop, a good half of the business of quarter sessions—no trifling portion of the means of support of the junior members of the bar! The abolition of settlement by hiring and service has long been pronounced inevitable. The only question which the demands of the public, and the evidence, leave the commissioners to determine, is between settlement by residence for a number of years—some say five years, others are for ten years—and settlement by birth alone. The balance of opinion seems to preponderate in favour of the latter.

Mr. Sturges Bourne takes very little part in the proceedings of the commission. We hear that the evidence as to the salutary operation of his act is full to a degree which must be highly satisfactory to him. The chief working man in the commission is Mr. Senior, whose instructions to the assistant commissioners are framed with great ability, and have been generally applauded.<sup>1</sup> The queries for the

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<sup>1</sup> We subjoin the concluding paragraphs of the Instructions, from which a notion of their spirit may be caught:—

"A brief and imperfect outline has now been given of the specific points of inquiry respecting the practical operation of the laws for the relief of the poor, and the manner in which those laws are administered. But there are two general inquiries, to which each specific inquiry may be made subservient. One is, the great question how far the law which throws on the owners of property the duty of

town parishes were framed by Mr. Coulson, who has contrived to distinguish himself as a sound practical lawyer, an influential public writer, and an accomplished

providing the subsistence, and superintending the conduct, of the poor, has really effected its object ;—how far the proprietors of land and capital appear to have had the power and will to create, or increase, or render secure, the prosperity and morality of those who live by the wages of labour. It has been supposed that it was to the 43d of Elizabeth, and to the superintendence which it forced the richer to exercise over the poorer, that we owed the industry, the orderly habits, and the adequation of their numbers to the demand for labour, which within the memory of man distinguished the English labourers ; and that the idleness, profligacy, and improvidence, which now debase the character and increase the numbers of the population of many of the South-eastern districts, are owing to the changes, partly by statute, and partly by practice, to which that law has been subjected. On the other hand, it has been maintained, that it is the natural tendency of public relief, however purely and wisely administered, to become a substitute, and a very bad substitute, for private charity on the part of the rich, and industry and forethought on the part of the poor : that the pure or wise administration of that relief is the exception, not the rule ; that it has more frequently been used as an engine to reduce the wages of labour, or to shift their burthen from the employer, or to gratify the love of power or of popularity ; that where real humanity has been the motive for interference, it has been so little assisted by knowledge or diligence, as to produce, or aggravate, or perpetuate, the misery which it was intended to relieve ; and that the system appeared to work well only while balanced by an almost arbitrary power of removal, and the dread of the workhouse, and while the range of magisterial interference was closely limited.

“ The other general question is, how far the evils of the present system, or rather of the law which allows, or at least does not prevent, the existence in every parish of every different system of abuse, are diminishing, stationary, or increasing. There can be no doubt that any change in the poor laws, or in the manner of administering them, if great enough to be extensively beneficial, must be attended with immediate local suffering. If, however, the present evils, oppressive as they are, appear to be diminishing, or even to be stationary, it may be more prudent to endure them, than to encounter the certain inconvenience, and the probable hazard, of any extensive alteration. But if the conclusions drawn in the House of Commons’ Report of 1817 be correct,—if it be true, that ‘ unless some efficacious check ‘ be interposed, the amount of the assessment will continue, as it has done, to increase, until, at a period more or less remote, according to the progress the evil ‘ has already made in different places, it shall have absorbed the profits of the property on which the rate may have been assessed, producing thereby the neglect ‘ and ruin of the land, and the waste or removal of other property, to the utter ‘ subversion of that happy order of society so long upheld in these kingdoms ;’—if the progress of the evil, even during the short period that has elapsed since that Report was made, may be traced in the diminished cultivation and value of the land ; the diminution of industry, forethought, and natural affection among the labourers ; the conversion of wages from a matter of contract into a matter of right, and of charity itself into a source of discord, and even of hostility ; in the accelerated increase of every form of profligacy ; in fires, riots, and organised and almost treasonable robbery and devastation ;—if such be the representation which the commissioners have to make to his Majesty, they cannot append to it a suggestion of mere palliative amendments.”

economist, at once. Mr. Chadwick has been appointed to inquire into the operation of the poor laws in the most heavily burthened portion of the Metropolis, and has also visited Berkshire. There are two or three other barristers on the commission, but they have not as yet taken any prominent part in the proceedings. It is expected that the Lord Chancellor will bring forward whatever measure the government may ultimately resolve to adopt.

Towards the end of the last session, our promising government renewed their promises of a new system of municipal police, which has long been most earnestly desired by the most respectable inhabitants of the country towns; and the trial of the Bristol magistrates (now pending) will add not a little to the evidence of its expediency. But a new system of municipal police implies, we should suppose, new municipalities; and whether our government will acquit itself better on this perplexing subject than the French, remains to be seen. Nothing has yet been heard of the plan which one or two members of the administration announced as matured, and probably such professions merit little more reliance than Lord Brougham's, when he took the whole duty of amending or superseding the poor laws on himself. It would be no easy matter to name either of them, who, from leisure or previous qualification, is likely to have prepared such a plan or to have been crammed with one. A work will shortly appear, which, by reviving public attention, may assist in bringing their professions to the test. In the *London Review*,—started some three years ago under very able editorship, though in most inauspicious times,—appeared a remarkably good article on Police, which attracted considerable attention at the time both here and abroad. Conceiving that the re-publication of it might be useful at the present time, the Archbishop of Dublin, with his wonted zeal for the diffusion of valuable information, proposed to the writer (Mr. Chadwick, a barrister of the Inner Temple,<sup>1</sup>) to reprint it in an amended form in the Appendix to his Lordship's Letter on Secondary Punishments. In correcting it for this purpose, however, it was found that such large additions would be necessary as must bring the article, originally a very long one, to the size of a moderate volume; and Mr. Chadwick, by the advice of his friends, has consequently resolved on publishing it as a distinct Treatise on Police. It will appear very shortly.

The Committee on Secondary Punishments has made a Report, which, with the Archbishop of Dublin's Letter, will be reviewed in our next.

Mr. Serjeant Spankie has been made a King's Serjeant, and Messrs. Beames, Swarston, Rolfe, and Joy, King's Counsel.

Courses of Lectures are announced as usual: at King's College, by Mr. Park, and at the London University, by Mr. Amos and Mr. Austin. Mr. Park, in addition to his courses on Politic and Scientific Law, announces a course on Conveyancing, which cannot fail to be an extremely valuable one. Mr. Amos will pursue the same course of instruction (by lectures, legal conversations, and examinations intermixed,) which gave general satisfaction before. Mr. Austin will resume his course of lectures on jurisprudence on the 8th of November, suppressing the matter contained in his printed lectures, unless the members of his class shall wish him to deliver it orally. There is also some hope of his being induced to prepare a course on the Roman Law, or the Law of Nations, for the ensuing session; but it is almost too much to ask him to make an extraordinary exertion for such a

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<sup>1</sup> The Poor Law Commissioner before mentioned and the gentleman whose name occupies so distinguished a place in Mr. Bentham's will.

meagre audience as he hitherto has had. Here then is a man, who, had his lot been cast in Germany, would go far towards founding the fame of a University; would do what Savigny, Thibaut, Mittermaier, Gans, are doing, and Gustavus Hugo has done; yet, merely for want of a public to appreciate him, his enlightened projects are announced as contingencies, his best conceptions are blighted as they bud, the seed he sows is scattered upon rocks, or seen struggling, weakly and rarely, through tares. Still there are hopes, for every one is praising his book, and whilst there are any, he must go on. Should they be realized, and one of the two subjects abovementioned be selected for a course, we venture to express a hope that the Law of Nations may be that one. We speak with reference to immediate interest and utility; being well aware that the Roman Law is at the bottom of all that is best in the modern continental systems, and of much more than is ordinarily supposed in our own.<sup>1</sup>

Sir Albert Pell, a judge of the Court of Review in Bankruptcy, and Mr. Stephen, the Master in Chancery, have died within the last three months.

Sir Albert Pell was of a good family, and regularly educated for the bar.<sup>2</sup> He is said to have led a gay idle life at the University; so much so indeed, that his college acquaintances were not a little surprised at his making choice of a profession, in which a reasonable share of application is generally considered necessary, or useful at the least. To one of his early friends who ventured a hint to this effect, he replied, that, for all that, he had no doubt of being leader of the Western Circuit within twelve years from his call to the bar.<sup>3</sup> He got on however very slowly at first; and so little prospect was there, when he first assumed the coif, of his realising his expectations, that the able author of "Criticisms on the Bar," of whose acute suggestions we always gladly avail ourselves, exclaims: "I cannot persuade myself that he ever contemplated the good fortune he has experienced." Indeed, with Lens, Gibbs, and Gifford for competitors, it was a neck-or-nothing step to take rank. But Gibbs and Gifford were promoted, and Lens retired, as if on purpose to make way for him; and the object of Sir Albert Pell's ambition was attained, though there were still both sound lawyers and able advocates to contest it with him. After enjoying the fruits of his victory for some years, he rather unaccountably retired from the bar. It has been rumoured that Mr. Serjeant Wilde drove him off, but this notion is hardly reconcileable with his undoubting confidence in himself, and the qualities he really possessed to justify it. Though unequal to those grand occasions where a high-toned eloquence shines out, few men were ever better fitted for those commonplace cases of which the far greater part of *nisi prius* business consists. His tact in such matters was almost unerring, and his examination of a sluggish, stupid or unwilling witness, was inimitable. Then he was always sure to place himself on the best possible footing with common jurymen, with whom he kept up a constant communication by the eye; and his volubility imposed itself on ordinary assize audiences for eloquence. We must say we never

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<sup>1</sup> The best modern book on the Law of Nations is the following: *Cours de Droit Public, Interne et Externe, par Le Commandeur Silvestre Pinheiro Ferreira, Ministre d'Etat de S. M. T. F. &c.* 2 tom. Paris, 1830. The highly distinguished author of this work has also published a proposal for a code of Public Law, which is well worthy the attention of European statesmen.

<sup>2</sup> At St. John's College, Oxford.

<sup>3</sup> This was said to the Rev. E. Taylor, late of Shapwick House in Somersetshire, from whom the writer had the anecdote.



heard an educated man of Sir Albert Pell's rank in society speak worse, so far as taste or even grammar is concerned. His words were neither the right words nor in the right places, but he had plenty of them,—as Johnson said of Churchill, he was a tree that only bore crabs, but bore a great many ; and such occasionally was the effect of his eager and zealous though disjointed elocution, his thick-coming though inconsequential sentences, bit-by-bit evolving the argument till the whole was vividly brought out, as to have drawn forth the sarcastic commendation of the present Chancellor,—that if not *eloquence*, it was *pelloquence*, and deserved to have a chapter in books of rhetoric to itself.<sup>1</sup>

In the interval that elapsed between his retirement from the bar and his promotion to the Bankruptcy Bench, he played an active part as a Middlesex magistrate, and, with all his display of intemperance in that capacity, must be allowed to have done good. What led Lord Brougham to select him for a bench of justice, it is difficult to explain,—probably some private or party predilection ; for we defy any man to name an individual of competent station who would have been pronounced by acclamation so utterly unfit for a judge. Luckily, the nature of the court did not allow him many opportunities of exposing his want of judgment, temper and law, for he availed himself of the few that he had. It is understood that the vacant seat in the Court of Review will remain untenanted.

Mr. Stephen died so recently that we are obliged to postpone our notice of his life.

Oct. 26th, 1832.

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<sup>1</sup> The anecdote related in our second volume (p. 578) was of him. It was during the celebrated Portsmouth case that the above remark was made.

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#### ERRATUM.

Page 436, line 27, instead of "*whose permission was indispensably, and in the first instance necessary,*" read, "*whose permission was indispensable in the first instance.*"

## NOTICES TO CORRESPONDENTS.

J. C. G. has our thanks; we shall avail ourselves of his communication.

We will write by the first opportunity to Mr. H. of Edinburgh.

The gentlemen who complain of the temporary discontinuance of the articles on Mercantile Law, are assured that they cannot regret it more deeply than ourselves. Those who know the writer will be at no loss to account for it, and those who do not, are informed that he is a candidate for the honour of a seat in Parliament, which, we are obliged to own, his acquirements and talents render no unreasonable object of ambition, however we may suffer from the circumstance. We have half a paper in hand, and he faithfully promises to continue his labours more unremittingly than ever before long.

We decline inserting Mr. Whittle Harvey's communication. Both in pamphlets and speeches he has again and again challenged inquiry into the ground of his exclusion from the Bar. He cannot assert that he was dragged before the public by us; and it is therefore absolutely preposterous to say that, because we made an observation or two on his case, we are bound to publish a reply four times as long as what he designates our attack, and reprint letters which are already before the public in print. We consider Mr. Harvey a clever man, and a useful member of Parliament, but we adhere to what we said formerly, that, in our opinion, his rejection was right.

## LIST OF NEW PUBLICATIONS.

The Law and Practice of Elections (for Scotland) as altered by the Reform Act, &c. including the Practice on Election Petitions; also showing the Duties to be performed by Sheriffs, Sheriff Substitutes, Sheriff Clerks, Town Clerks, &c. in respect of the Registration of Voters. With an Appendix containing the 9 G. 4. c. 22, regulating the presenting, prosecuting, and trial of Election Petitions to the House of Commons, and the 2 & 5 W. 4. c. 64, being the Reform and Boundary Act for Scotland, together with the Schedules and Tables thereto annexed. By Charles F. F. Wordsworth, Esq. of the Inner Temple. In 8vo. Price 10s. 6d. boards, pages 186.

A Practical Treatise of Assets, Debts, and Incumbrances. By James Ram, of the Inner Temple, M. A. Barrister at Law. In 8vo. Price 1l. 1s. boards, pages 645.

**Complete Election Guide.** The Reform Act, 3 W. 4. c. 45, Dissected, Arranged, and Illustrated by a Commentary on its various provisions with reference to the general Law and Practice of Elections, directing Electors, Candidates, and Officer in the Prosecution and Exercise of their Rights and the performance of their Duties; with the Boundary Act, 3 & 3 W. 4. c. 64. By George Price, Esq. of the Inner Temple, Barrister at Law. In 12mo. Price 9s. 6d. boards, pages 294.

**Thoughts on Secondary Punishments,** in a Letter to Earl Grey. By Richard Whately, D.D., Archbishop of Dublin. To which are appended, two articles on Transportation to New South Wales, and on Secondary Punishments; and some Observations on Colonization. London. October, pages 204.

[We shall review this work in our next number. The articles appended are an article by the Archbishop himself, originally printed in the London Review, since dropped; and the article on Secondary Punishments, which appeared in the fifteenth number of the Law Magazine.]

**The Principles of Conveyancing,** designed for the use of Students, with an Introduction on the Study of that Branch of Law. By Charles Watkins, Esq. of the Middle Temple, Barrister at Law. Eighth Edition, with large additions, containing the law relative to the creation and Transfer of Estates and Interests in real and personal Property. By John Merrifield, Esq. of the Middle Temple, Barrister at Law. In Royal 8vo. Price 1l. 8s. boards, pages 750.

[The title page of this work, from the glance we have taken of its contents, seems to give a very inadequate notion of its character. It appears to be in reality a complete and original elementary Treatise on the Law of Real Property.]

**The History and Results of the Present Capital Punishments in England,** to which are added, Full Tables of Convictions, Executions, &c. Part I. By Humphry W. Woolrych, Esq. Barrister at Law.

**A Collection of Statutes,** comprising all the Public Acts, Civil and Criminal, Irish and Scotch, the acts relating to the Colonies, and the Metropolitan Cemetery Act, passed in 2 W. 4. and 3 & 3 W. 4., with notes, showing the alteration made in the law by each Statute. By Alfred S. Dowling, Esq. of Gray's Inn, Barrister at Law. In 12mo. Price 18s. boards, pages 904.

**A Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of unsound mind,** with an Appendix of the Statutes of England, Ireland, and Scotland, relating to such persons, and Precedents and Bills of Costs. By Leonard Shelford, Esq. of the Middle Temple, Barrister at Law. In 8vo. Price 1l. 8s. Pages 866.

**What are Courts of Equity?** A Lecture delivered at King's College, London, April 6, 1832. By J. J. Park, Esq. Barrister at Law, Doctor of Law of Göttingen, the Professor of English Law and Jurisprudence, London. 1832, pages 32.

[This appears to be little more than a paraphrase of Blackstone's observations on Equity, in the Third Book of the Commentaries, ch. 27.]

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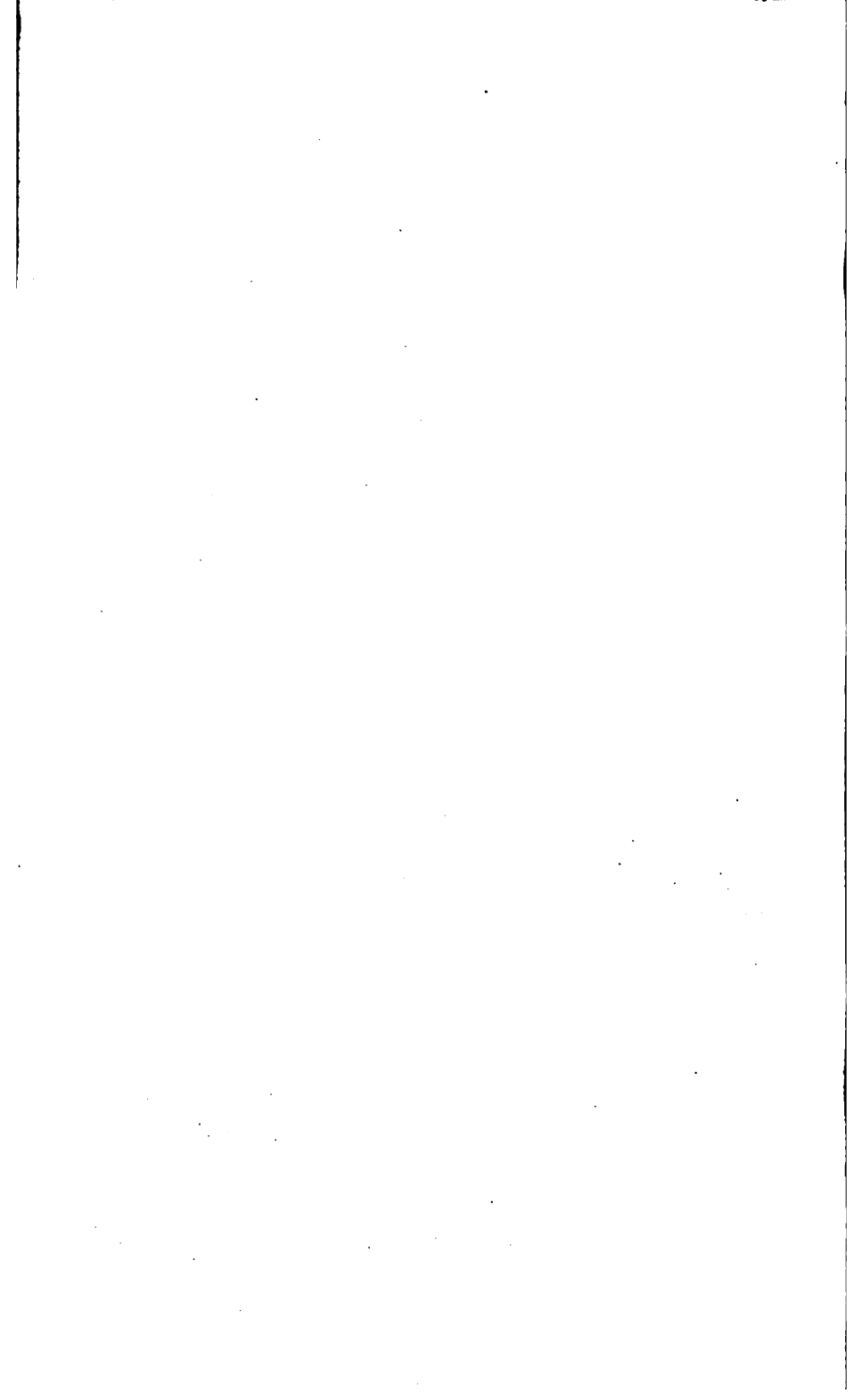
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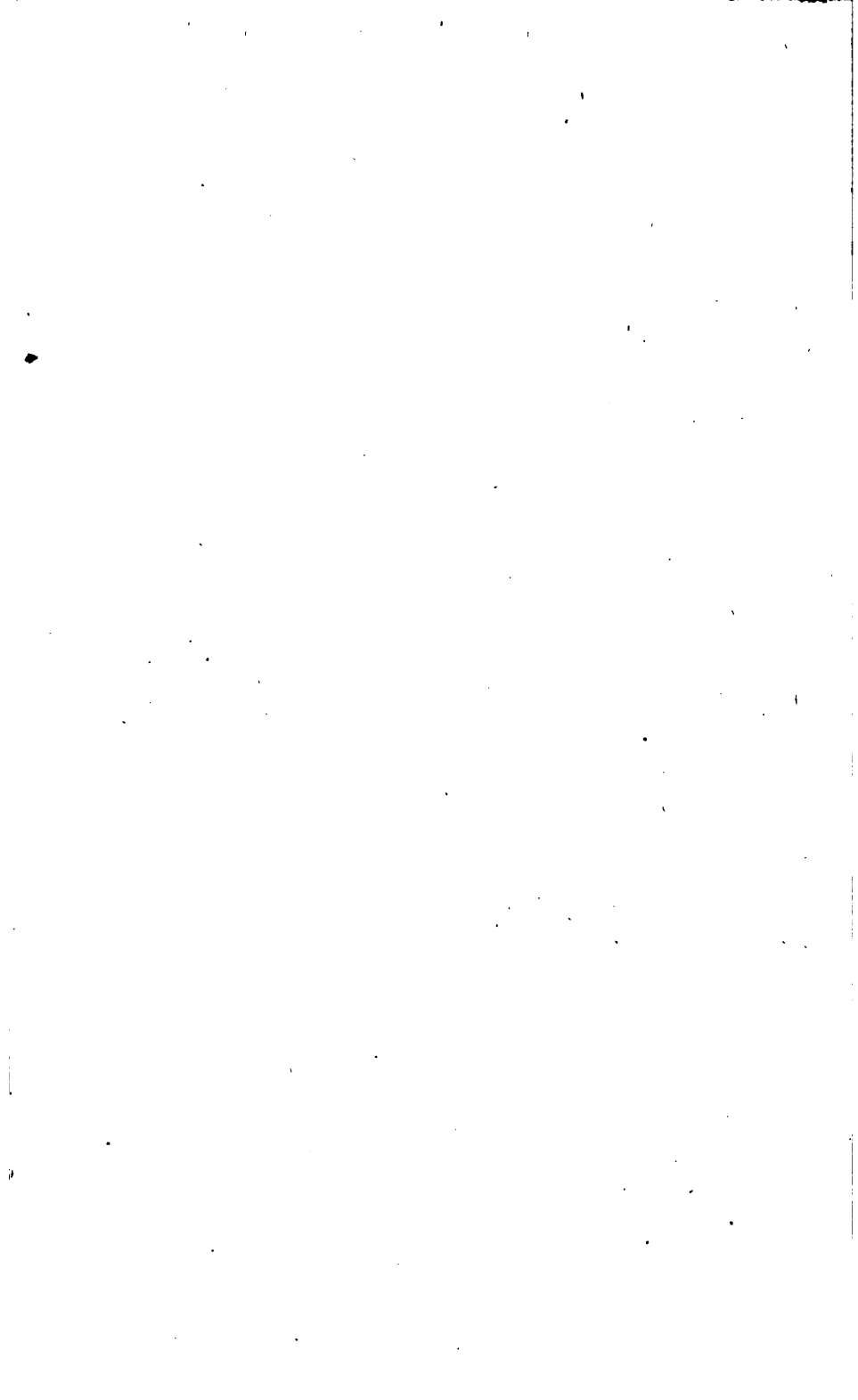
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